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Arbitration and the Batson Principle

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ARBITRATION AND THE *BATSON* PRINCIPLE

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TABLE OF CONTENTS

INTRODUCTION	1147
I. THE <i>BATSON</i> PRINCIPLE	1151
II. IS A DISPUTANT IN AN ARBITRATION A STATE ACTOR WHEN HE EXERCISES A PEREMPTORY CHALLENGE?	1158
A. STATE ACTION DOCTRINE	1163
1. <i>Entanglement</i>	1167
2. <i>Public Function</i>	1175

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III. APPLICATION OF STATE ACTION IN ARBITRATION 1178

 A. COURT-ORDERED ARBITRATION 1178

 B. CONTRACTUAL ARBITRATION 1186

 1. *Applying Entanglement Jurisprudence to Contractual Arbitration.* 1189

 2. *Public Function and Arbitration* 1194

IV. A PUBLIC POLICY ANALYSIS RESPECTING DISCRIMINATORY SELECTION OF AN ARBITRATOR 1196

 A. CONSIDERATION OF A PUBLIC POLICY CHALLENGE UNDER EXISTING CASE LAW 1197

 B. A PUBLIC POLICY ANALYSIS INFORMING OUR PROPOSED MODEL STATUTE 1211

 1. *The Interests of the Disputants* 1212

 2. *The Interests of the Excluded Arbitrator* 1217

 3. *The Interests of the Community* 1220

V. A MODEL STATUTE RESPECTING DISCRIMINATORY SELECTION OF AN ARBITRATOR 1226

 A. TEXT OF THE PROPOSED STATUTE 1226

 B. DISCUSSION OF THE PROPOSED STATUTE 1228

VI. CONCLUSION 1239

INTRODUCTION

The Equal Protection Clause forbids a state actor from excluding a person from serving on a jury on the basis of his race or sex.¹ We shall call this prohibition the *Batson* principle.² In this Article, we consider an expansion of the *Batson* principle to arbitration proceedings. Specifically, this Article considers whether or not it should be permissible for a party to a court-ordered or contractual arbitration to exercise a peremptory strike against a potential arbitrator on the basis of the potential arbitrator's race, sex or other characteristic which would not be a permissible basis for such a strike of a potential juror in a public court proceeding.

We suspect that this problem is commonplace but generally flies beneath the radar screen. Two hypothetical scenarios, both of which are derived from actual cases and in which a disputant uses discriminatory criteria in selecting an arbitrator, will help us to illustrate the dimensions of the practices with which we are concerned. The first scenario involves one party's use of a peremptory challenge to an arbitrator so as to "stack the deck" in the proceeding to the disadvantage of the other party. More precisely, it involves discrimination to which one disputant objects and which is based on the other disputant's desire to exclude any member of a certain protected group from the arbitration panel. The second scenario involves a decision by both parties to insist that the arbitrator or arbitrators be chosen from a protected group. Thus, it involves discrimination to which both parties to the arbitration have expressly consented and which is based on a mutual desire to include a member of a certain protected group on the arbitration panel. We believe it will be helpful in thinking through the harms and benefits that might flow from a discriminatory selection of an arbitrator to keep these scenarios in mind.

¹ See U.S. CONST. amend. XIV, § 1.

² See *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986) (holding that Equal Protection Clause precludes prosecutor's peremptory challenge on basis of race). For a discussion of the case law establishing the principle of non-discrimination in jury selection, see *infra* notes 13-56 and accompanying text (detailing *Batson* principle).

In the first case,³ an employer and an employee, at the start of their employment relationship, enter into an agreement that they shall use arbitration to resolve any legal claim that either otherwise would bring in court against the other. The agreement calls for arbitration pursuant to the rules of a specified arbitration organization. Those rules call for the organization to assign a three-member panel to arbitrate a dispute. The rules also give to both complainant and respondent one peremptory strike to remove an assigned panelist. In the event a party so removes a panelist, the arbitration organization is then to assign a replacement panelist.

The employee later files a notice of arbitration alleging that the employer, whose upper management is dominated by Irish Catholics, passed him over for promotion because he is Jewish. The panel that the organization originally assigns to hear the case consists of arbitrators named McShea, Ryan, and Rubenstein. The employer exercises its peremptory strike to remove arbitrator Rubenstein because it believes he is Jewish. The arbitration organization then assigns a replacement arbitrator named Callahan to the case. For ease of discussion, and because the parties did not expressly consent at the time of the making of the arbitration agreement to the discriminatory selection of an arbitrator, we shall refer to this scenario as the Non-Consensual Scenario.⁴

In the second case, a Jewish man and Jewish woman enter into a prenuptial agreement providing that any custody dispute that might arise out of the fracture of their family shall be resolved by a Beth Din or by other Jewish arbitrators versed in Jewish law and shall be governed by Jewish religious law respecting child custody.⁵

³ This hypothetical is based on an actual case in which one of the authors served as counsel for the employer/respondent. The names used are fictional.

⁴ See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 504 (7th Cir. 2000) (discussing situation in which party opposing female litigant struck sole female arbitrator from list of fifteen potential arbitrators provided to parties by American Arbitration Association but in "purely commercial dispute[]" in which neither gender discrimination nor sexual harassment seemed to be in issue).

⁵ See *Kovacs v. Kovacs*, 633 A.2d 425, 437 (Md. Ct. Spec. App. 1993) (remanding child support section of arbitration award); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 741 (N.Y. App. Div. 1993) (holding that prior agreements to arbitrate child custody are not enforceable); *Cohen v. Cohen*, 600 N.Y.S.2d 996, 997 (N.Y. App. Div. 1993) (holding that custody disputes are not subject to arbitration); *Agur v. Agur*, 298 N.Y.S.2d 772, 779 (N.Y. App. Div. 1969) (striking section of arbitration agreement involving child custody); *Rakoszynski v.*

Years later, when the then-married couple separates, the husband seeks to enforce the arbitration agreement. The wife seeks to avoid arbitration and argues that the agreement violates public policy. For ease of discussion, and because both parties expressly consented at the time of the making of the arbitration agreement to the discriminatory selection of the arbitrators, we shall refer to this case as the Consensual Scenario.

In this Article, we consider the extent to which an agreement to discriminate in the selection of an arbitrator should be enforceable and the extent to which the actual discriminatory selection of an arbitrator should invalidate a subsequent arbitration award. To fully consider these questions, we address three broad issues: First, we consider the extent to which the Equal Protection guarantees of the Constitution govern discriminatory selection of an arbitrator. Second, we consider the extent to which public policy considerations should preclude judicial enforcement of arbitration agreements and awards affected by discriminatory selection of an arbitrator. Finally, we consider how best to structure a statute that would allow an arbitration disputant to challenge the discriminatory selection of an arbitrator while not unreasonably undermining the efficiency and finality of arbitrations.

In nearly a century and a quarter of case law, the Supreme Court has set out the parameters of the principle of non-discrimination in the context of jury selection. This jurisprudence frames our analysis in the context of the discriminatory selection of an arbitrator. We

Rakoszynski, 663 N.Y.S.2d 957, 958 (N.Y. Sup. Ct. 1997) (holding that prior agreement to arbitrate child custody will not be upheld); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495 (N.Y. Sup. Ct. 1991) (vacating award of child custody due to adverse effects on children); E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1207 (2000) (arguing that such arbitration agreements and resulting arbitration awards respecting child custody should not be subject to "best interest of the child" review but rather should be reviewed "to ensure that the award does not promote abuse or neglect of the child or subject the child to a likelihood of harm"). See also AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.06 (2000) (providing that court should order provisions of visitation and custody agreement to which parents have agreed at time of hearing unless court finds that agreement was not voluntary or would be harmful to child); *id.* § 2.10 (providing that where parents have agreed in parenting plan to binding arbitration with respect to parental dispute arising thereafter, court should enforce resulting award with respect to child unless agreement was not voluntary or award would be harmful to child).

begin this Article, therefore, in Part I, with a discussion of the relevant case law.⁶

Next, beginning in Part II, this Article contemplates whether this non-discrimination principle should extend beyond jury selection in the public courts to prohibit disputants who are participating in an arbitration from exercising a peremptory strike against a potential arbitrator on a basis which would be an impermissible ground for such a strike of a potential juror in a public court proceeding.⁷ Parts II and III of the Article consider when, if ever, the protections of the Equal Protection Clause govern participants in an arbitration. More specifically, Part II sets out the basic framework for testing whether state action exists.⁸ Part III then applies this framework to the issue of whether a disputant in an arbitration may properly be considered a state actor (and, therefore, subject to the constraints of the Equal Protection Clause) when he exercises a peremptory challenge to a potential arbitrator in the proceeding.⁹

Part IV of the Article considers whether an arbitration party might successfully oppose enforcement of an arbitration award on public policy grounds where the selection of the arbitrator was tainted by intentional discrimination that would offend the *Batson* principle.¹⁰ This Part further considers the policies that should inform our model statute relating to the circumstances in which a court should enforce a contract to participate in an arbitration that involves the discriminatory selection of an arbitrator or enforce an arbitration award that involves such a discriminatory selection of an arbitrator.¹¹ A critical part of this analysis is a consideration of whether otherwise impermissibly discriminatory selection criteria should be permissible in circumstances where all disputants expressly consent to the discrimination. Such instances arguably include a contract that calls for each disputant to select a party-appointed arbitrator and an agreement between disputants jointly

⁶ See *infra* notes 13-56 and accompanying text.

⁷ See *infra* notes 57-154 and accompanying text.

⁸ See *infra* notes 57-154 and accompanying text.

⁹ See *infra* notes 155-246 and accompanying text.

¹⁰ See *infra* notes 247-319 and accompanying text.

¹¹ See *infra* notes 320-68 and accompanying text.

to select an arbitrator whom they hope shares a cultural experience with the disputants.

Finally, in Part V of the Article, we propose state and federal legislation that would ban in many cases discrimination on the basis of race, ethnicity, national origin, sex, religion, and sexual orientation in the selection of an arbitrator but would allow such discrimination in other specified circumstances.¹² In particular, we would allow discriminatory selection of an arbitrator in cases in which all disputants expressly consent to the discrimination and in which the discrimination is pertinent to a material issue in the case. In this Part, we set out our thoughts on how best to structure a prohibition on any other discriminatory selection of an arbitrator with a focus on maintaining the efficiency and finality that arbitration disputants commonly prize.

I. THE BATSON PRINCIPLE

As noted above, the Equal Protection Clause proscribes discrimination on the basis of race or sex by a state actor in the selection of a juror.¹³ An understanding of this non-discrimination principle in juror selection and its basis is a prerequisite to any analysis of whether a similar proscription should exist in the arbitration context. In this Part, therefore, we review the Supreme Court jurisprudence setting out and developing this principle of non-discrimination in juror selection and the bases for it.

In 1879, the Supreme Court first addressed a criminal defendant's challenge to the State's exclusion of persons from jury service on account of their race.¹⁴ In *Strauder v. West Virginia*, a black criminal defendant challenged a West Virginia statute that provided for only white men to serve as jurors.¹⁵ In considering whether this statute violated a black criminal defendant's right to equal protection, the Court noted that "prejudices often exist against particular classes in the community, which sway the judgment of jurors, and

¹² See *infra* notes 369-404 and accompanying text.

¹³ See U.S. CONST. amend. XIV, § 1. See also *supra* note 2 and accompanying text (introducing *Batson* decision).

¹⁴ *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

¹⁵ *Id.* at 304.

which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."¹⁶ Relatedly, the Court concluded that the statute which required a black man to stand trial before a jury from which the State had expressly excluded all black persons solely on account of their race undermined the protective function of trial by jury.¹⁷ The Court concluded, therefore, that such exclusion violated the black criminal defendant's right to equal protection of the laws.¹⁸

Strauder involved facial race discrimination in the assembling of the criminal venire. Eighty-five years after *Strauder*, in the case of *Swain v. Alabama*,¹⁹ the Court addressed a challenge to the State's alleged practice of racial discrimination in the selection of jurors for the criminal petit jury from those persons assembled in the venire.²⁰ In *Swain*, the Court reaffirmed the principle that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."²¹

Nevertheless, the Court refused to hold that a prosecutor's use of the State's peremptory strikes to remove jurors on account of their race in any particular case amounted to a denial of equal protection.²² The Court considered at length the nature of peremptory challenges:

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality,

¹⁶ *Id.* at 309.

¹⁷ *Id.* at 308-10. The Court labeled the statute's exclusion of black persons from jury service on account of their race a "brand upon them . . . of their inferiority" and noted that this State stigmatization would stimulate additional prejudice against black people, which would impede the quest for equal justice for black people. *Id.* at 308.

¹⁸ *Id.* at 310.

¹⁹ 380 U.S. 202 (1965).

²⁰ *Id.* at 202.

²¹ *Id.* at 203-04.

²² *Id.* at 221.

occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.²³

In denying the black criminal defendant's claim that the prosecutor's use of peremptory challenges to remove all potential black jurors on account of their race in the case violated the defendant's right to equal protection, the Court considered the nature of the peremptory challenge and reasoned that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge" and would, in effect, destroy the peremptory challenge.²⁴ The Court held, therefore, that "[i]n the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case."²⁵

The Court further held, however, that a criminal defendant would show an equal protection violation if the defendant could demonstrate that the prosecutor's use of peremptory challenges had resulted in the exclusion of persons from the jury on account of their race "for reasons wholly unrelated to the outcome of the particular case on trial."²⁶ To make this showing, the defendant would have to demonstrate that the prosecutor had used the State's peremptory challenges against potential jurors of a particular race systematically in numerous cases "over a period of time."²⁷

Twenty-one years after *Swain*, in the case of *Batson v. Kentucky*, the Supreme Court overruled *Swain* with respect to the evidentiary burden that a criminal defendant must carry when he claims an equal protection violation based on a prosecutor's use of a peremp-

²³ *Id.* at 220-21.

²⁴ *Id.* at 221-22.

²⁵ *Id.* at 222.

²⁶ *Id.* at 224.

²⁷ *Id.* at 227.

tory challenge or challenges to exclude a member or members of the claimant's race from the criminal petit jury.²⁸ The Court in *Batson* observed that *Swain* had "placed on defendants a crippling burden of proof" with the result that "prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."²⁹ The Court went on to hold that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."³⁰ *Batson* firmly established the principle that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."³¹

In *J.E.B. v. Alabama ex rel. T.B.*,³² the Supreme Court extended the *Batson* standard to proscribe intentional discrimination on the basis of sex in the exercise of a peremptory challenge.³³ The court subjected peremptory challenges based on sex to a heightened scrutiny, asking whether such challenges "provide substantial aid to a litigant's efforts to secure a fair and impartial jury."³⁴ In sum, the Court held that such challenges do not provide such aid:

²⁸ 476 U.S. 79, 80 (1986).

²⁹ *Id.* at 92-93.

³⁰ *Id.* at 96.

³¹ *Id.* at 89. In *Powers v. Ohio*, 499 U.S. 400, 402 (1991), the Supreme Court held that a criminal defendant may object to the prosecution's use of a peremptory challenge to exclude a potential juror of a particular race on account of his race, even if the defendant and that juror do not share the same race. The Court reiterated that the *Batson* principle serves not only to protect a defendant from discrimination in the selection of his jury but also to protect the excluded juror and the community at large. *Id.* at 406. The Court made clear that a venireperson has an equal protection right not to be excluded from jury service on account of his race. *Id.* at 409. The Court further held that a criminal defendant in such a case had standing to assert the equal protection claim of the excluded juror in light of (1) the injury visited upon the criminal defendant himself (relating to the fact that the verdict in the defendant's case will not be understood to have been "given in accordance with the law by persons who are fair"); (2) the common interest of the defendant and the excluded juror "in eliminating racial discrimination from the courtroom"; and (3) the "daunting" barriers to bringing suit faced by the excluded juror. *Id.* at 410-15.

³² 511 U.S. 127 (1994).

³³ *Id.* at 129.

³⁴ *Id.* at 137; cf. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (finding that "woman is still regarded as the center of home and family life" and, for that reason, upholding under rational basis review Florida statute that gave to women but not to men absolute exemption from jury service but allowed women to expressly waive their exemption).

"[G]ender, like race, is an unconstitutional proxy for juror competence and impartiality."³⁵ Moreover, the Court held that truth is no defense—that is, state actor sex discrimination in juror selection violates the Equal Protection Clause even if the state actor seeks to justify such discrimination by reference to a gender stereotype shown by statistical evidence to have a basis in fact.³⁶

In *Batson*, in *J.E.B.*, and in subsequent cases, the Supreme Court has enumerated the harms that it sees as flowing from race and gender discrimination by the State in juror selection. First, the criminal defendant is harmed.³⁷ In general, the jury provides something of a safeguard for the defendant against arbitrary government action.³⁸ But when the defendant is denied a jury composed of persons who are "‘peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds,’" he is denied "the protection that a trial by jury is intended to secure," namely protection "against the arbitrary exercise of power by prosecutor or judge."³⁹ More specifically, he suffers an increased risk that the proceeding will be influenced by the same prejudice that affected the jury selection.⁴⁰

Second, the excluded juror is harmed.⁴¹ He is harmed first in that he is denied participation in jury service for reasons unrelated to his competence to serve.⁴² Moreover, he is harmed also by the

³⁵ *J.E.B.*, 511 U.S. at 129.

³⁶ *Id.* at 139 n.11.

³⁷ *See, e.g., id.* at 128 (holding that defendant has right to jury selected by nondiscriminatory criteria).

³⁸ *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (outlining purposes of including right to jury trial in federal and state constitutions).

³⁹ *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

⁴⁰ *J.E.B.*, 511 U.S. at 140.

⁴¹ *See, e.g., id.* at 128 (holding that potential jurors have equal protection right to fair selection procedures); *Batson*, 476 U.S. at 87 (finding that juror is discriminated against when denied service on account of race).

⁴² *Batson*, 476 U.S. at 87.

brand of inferiority placed upon him by the act of discrimination:
The discriminatory act

denigrates the dignity of the excluded juror, and . . . reinvoles a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender [or race], are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.⁴³

Third, the community is harmed in two distinct ways.⁴⁴ Racially discriminatory juror selection procedures “undermine public confidence in the fairness of our system of justice”⁴⁵ by giving rise to the impression that “the ‘deck has been stacked’ in favor of one side” through inclusion of a partial jury.⁴⁶ Discriminatory juror selection procedures also perpetuate invidious stereotypes relating to the abilities of the disfavored group members by ratifying and reinforcing those stereotypes.⁴⁷ The perpetuation of such stereotypes poses a grave danger for our society: “If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”⁴⁸

In two early 1990’s cases, the Supreme Court extended the *Batson* principle to the civil litigation context and to a criminal defendant’s use of peremptory challenges. In *Edmonson v. Leesville*

⁴³ *J.E.B.*, 511 U.S. at 142.

⁴⁴ See, e.g., *id.* at 140 (“Discrimination in jury selection . . . causes harm to . . . the community.”); *Batson*, 476 U.S. at 87 (finding that public confidence is undermined by discriminatory jury selection procedures).

⁴⁵ *Batson*, 476 U.S. at 87. See also *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (noting that “[s]election procedures that purposefully exclude African-Americans from juries undermine the public confidence” in fairness of jury system).

⁴⁶ *J.E.B.*, 511 U.S. at 140. See also *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (“The verdict will not be accepted or understood in these terms [as fair and given in accordance with law] if the jury is chosen by unlawful [discriminatory] means.”).

⁴⁷ *J.E.B.*, 511 U.S. at 140.

⁴⁸ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

Concrete Co.,⁴⁹ and in *Georgia v. McCollum*,⁵⁰ the Court held that the Equal Protection Clause prohibits, respectively, a civil litigant and a criminal defendant from intentionally discriminating on the basis of race in the exercise of a peremptory challenge.⁵¹ Both cases raised two similar critical issues: (1) whether, respectively, a civil litigant's and a criminal defendant's intentional racial discrimination in the use of a peremptory challenge inflicts the harms the Court identified in *Batson*, and (2) whether, respectively, a civil litigant's and a criminal defendant's intentional racial discrimination in the use of a peremptory challenge constitutes state action.⁵²

Concerning this first issue, the Court concluded that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."⁵³ Such discrimination, the Court noted, regardless of its source, not only harms the excluded juror but also, by undermining public confidence in our system of justice, harms the community and the integrity of the court system.⁵⁴

Regardless of the harms that racial discrimination in the exercise of peremptory challenges does inflict, the Equal Protection Clause does not proscribe such discrimination unless the discrimination constitutes state action.⁵⁵ Importantly, in both *Edmonson* and *McCollum*, the Supreme Court also concluded that the discrimination at issue constituted state action when engaged in by, respectively, a civil litigant and a criminal defendant.⁵⁶ We review the Court's state action analysis in *Edmonson* and *McCollum* in our discussion below of the state action doctrine as applied to the discriminatory selection of an arbitrator. We turn now to that topic.

⁴⁹ *Id.* at 614.

⁵⁰ 505 U.S. 42, 59 (1992).

⁵¹ *McCollum*, 505 U.S. at 59; *Edmonson*, 500 U.S. at 616.

⁵² *McCollum*, 505 U.S. at 48; *Edmonson*, 500 U.S. at 618-19.

⁵³ *McCollum*, 505 U.S. at 49; see also *Edmonson*, 500 U.S. at 618-19 ("Indeed, discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial.").

⁵⁴ *McCollum*, 505 U.S. at 49-50.

⁵⁵ *Id.* at 50; *Edmonson*, 500 U.S. at 619.

⁵⁶ *McCollum*, 505 U.S. at 53; *Edmonson*, 500 U.S. at 627.

II. IS A DISPUTANT IN AN ARBITRATION A STATE ACTOR WHEN HE EXERCISES A PEREMPTORY CHALLENGE?

The increasing popularity of alternative dispute resolution (ADR), particularly pre-dispute arbitration agreements, among employers and businesses has triggered skepticism and concern among the plaintiffs' employment discrimination bar and consumer advocates.⁵⁷ Groups and commentators critical of the use of ADR in this context often characterize the very advantages of these mechanisms—their streamlined procedures, speed and confidentiality—as problematic.⁵⁸ Streamlined procedures and speed may disproportionately impact the party who had less bargaining power when the initial agreement was negotiated. Confidentiality suggests surreptitious and underhanded tactics swept under the rug.⁵⁹ With little empirical support, critics, particularly of the use of pre-dispute arbitration agreements, began an attack in the mid-1990s to unseat arbitration as a popular mechanism for dispute

⁵⁷ See, e.g., EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 22 (1997) (discussing criticism of arbitration in employment discrimination cases); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 308 (2d ed. 2000) (noting concern regarding poor reception of arbitration in consumer context).

⁵⁸ Critics of arbitration and other ADR mechanisms argue that the pursuit of procedural benefits often carries with it dangerous substantive costs. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (recommending that ADR proponents consider the danger of broadening the scope of arbitration to encompass disputes more properly resolved through adjudication); Judith Resnik, *Failing Faith: Adjudicating Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-46 (1986) (noting that emphasis on ADR's speed and low cost ignores safeguards courts provide). Reynolds Holding, *Rules for Arbitrators Upheld, Stock Exchanges Asked U.S. Judge for Exemption*, S.F. CHRON. Nov. 13, 2002, at A23 (referring to series of stories in which the Chronicle critiqued mandatory arbitration).

⁵⁹ Several courts have found that a confidentiality provision in an arbitration agreement is unconscionable because such provisions favor the repeat participant in the arbitration process by making it difficult to determine whether the arbitrator or the arbitration process was biased. Moreover, courts find that the lack of public disclosure of arbitration results may favor repeat players over individuals. See *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (9th Cir. 2003) (holding that district court did not err in finding secrecy provision unconscionable), *cert. denied*, 124 S. Ct. 53 (2003); *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334, 342-43 (D.V.I. 2003) (finding that confidentiality favors repeat player); *Luna v. Household Fin. Corp.*, III, 236 F. Supp. 2d 1166, 1180-81 (W.D. Wa. 2002) (same); *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171-72 (N.D. Cal. 2002) ("The secrecy provisions of the arbitration agreements both affect the outcomes of individual arbitrations and clearly favor Defendants.").

resolution among employers and employees and businesses and consumers.⁶⁰ While plaintiffs initially contended that they could not be compelled to arbitrate statutory claims, repeated failure in that arena precipitated a redirection of effort. Today, challenges to arbitration primarily focus on contractual theories, particularly unconscionability.⁶¹ Yet arbitration's critics have sought other means for challenging arbitration clauses and, as a result, have begun leveling constitutional attacks against arbitration in all its forms as well as other court-ordered dispute resolution mechanisms.⁶²

A necessary prerequisite for constitutional challenges to arbitration, however, is some theory under which arbitration constitutes state action, since constitutional prohibitions apply only to state

⁶⁰ See, e.g., Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 275 (1990); Margaret A. Jacobs, *Woman Claims Arbiters of Bias are Biased, Too*, WALL ST. J., Sept. 19, 1994, at B1. Senator Russell Feingold also introduced legislation designed to invalidate pre-dispute arbitration agreements between employers and employees. See S. 2405, 103d Cong., 2d Sess. (1994); H.R. 4981, 103d Cong., 2d Sess. (1994). The proposed legislation was never enacted.

⁶¹ One of the primary modes for challenging arbitration agreements is the use of the unconscionability doctrine. Courts have been fairly receptive to this challenge, striking down arbitration agreements as unconscionable where class actions are prohibited, where an employee must pay an arbitrator's fees or a high filing fee, or where the arbitral process is skewed in favor of the employer or business. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668-70 (6th Cir. 2003) (invalidating cost-splitting provision of arbitration agreement); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (invalidating arbitration procedures "so skewed" to favor employer); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (construing agreement to require employer to pay arbitrator's fees so as not to be invalid); *Brower v. Gateway 2000, Inc.*, 246 A.2d 246, 255 (N.Y. 1998) (finding agreement requiring arbitration before ICC to be financially unconscionable).

⁶² Commentators agree that court-ordered mediation may not rise to the level of state action because of the mediator's lack of coercive power to make a decision in the case. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1049 (2000) (positing that since mediators do not have coercive authority to decide cases, instances in which state action will be found in mediation are limited); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 188 n.47 (2002) (citing Reuben); Colleen N. Kotyk, Note, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL RTS. J. 277, 293 (1997) (asserting that divorce mediation does not constitute state action).

action.⁶³ And, at least as an initial matter, it is difficult to see how agreements between private parties regarding arbitration meet this threshold requirement. Critics, however, have developed a theory of state action in the arbitral context to attempt to allow them to overcome this hurdle, at least with regard to some forms of arbitral agreements.⁶⁴

Under this arbitration-as-state-action theory, critics contend that contractual and court-ordered arbitration give rise to state action when the courts require parties to participate in arbitration and enforce subsequently issued arbitration awards.⁶⁵ If use of private or court-ordered arbitration is state action, constitutional requirements of due process and equal protection must be satisfied. In the context of this Article, the focus is on whether *Batson*, which allows an adversely affected party to level an equal protection challenge against an opposing party's misuse of a peremptory challenge, can be applied to the arbitrator selection process.⁶⁶ Because a finding of

⁶³ See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("Constitutional guarantees . . . do not apply to the actions of private entities."). The Constitution applies to non-governmental actors in some situations, such as the Thirteenth Amendment's prohibition of slavery. U.S. CONST. amend. XIII § 1.

⁶⁴ See *infra* note 69 and accompanying text.

⁶⁵ For example, Jean R. Sternlight makes an argument that mandatory arbitration involves state action in her article, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV. 1, 1 (1997) [hereinafter Sternlight, *Rethinking*]. In another article, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 676 (2001), Sternlight contends that a plaintiff who signs an arbitration agreement waiving the right to a jury trial on a federal claim should be permitted to claim a Seventh Amendment violation if the jury waiver was not knowing, voluntary and intelligent. The issue of whether an arbitration agreement should be treated as a waiver of the right to a jury trial is beyond the scope of this Article.

⁶⁶ *Batson* offers courts little procedural guidance regarding the administration of a *Batson* hearing. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (focusing on elements necessary to establish prima facie case of purposeful discrimination in jury selection). Typically, a *Batson* challenge must be raised between the time that the parties make their peremptory strikes and the time that a jury is sworn and the remainder of the panel is discharged. DAVID HITNER & ERIC J.R. NICHOLS, 2 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 29.10 (1998). Courts administering a *Batson* inquiry will then hold anything from an in camera hearing to a full evidentiary hearing in which attorneys testify, answering questions from opposing counsel or the court. Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187, 188-89 (1989). The party requesting the hearing must establish a prima facie case that the opposing party engaged in a pattern of strikes discriminating against prospective jurors on the basis of their race or gender. HITNER & NICHOLS, *supra*, § 29.10.

state action would have significant, and likely adverse, implications on the continued use of court-ordered and contractual arbitration, a careful consideration of whether state action is present in arbitration is necessary.

Although courts have yet to address the *Batson* question as it might arise in arbitration, they have addressed the question of whether judicial enforcement of arbitration agreements rises to the level of state action.⁶⁷ Interestingly, courts and commentators are deeply divided on the question of whether state action is present in contractual arbitration. Every federal court considering the question has concluded that there is no state action present in contractual arbitration.⁶⁸ Yet virtually every commentator address-

⁶⁷ See *infra* note 68 and accompanying text (listing decisions in which courts addressed question whether arbitration agreements rise to level of state action).

⁶⁸ See, e.g., *Perpetual Secs., Inc. v. Tang*, 290 F.3d 132, 137-39 (2d Cir. 2002) (finding that requirement of mandatory arbitration is not state action); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368-69 (7th Cir. 1999) (finding no basis to hold that plaintiff was deprived of her rights due to government action); *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 206-07 (2d Cir. 1999) (finding no state action in application or enforcement of arbitration clause); *Lodal, Inc. v. Home Ins. Co.*, No. 95-2187, 156 F.3d 1230 (Table), 1998 WL 393766, at *6 (6th Cir. June 12, 1998) (finding no state action since state did not compel arbitration); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-02 (9th Cir. 1998) (finding that SEC has not exercised sufficient influence for finding of state action); *United Food & Commercial Workers Union v. Safeway, Inc.*, No. 98-15148, 165 F.3d 918 (Table), 1998 WL 904719, at *1 (9th Cir. Dec. 23, 1998) (finding no state action since private arbitrator was used); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190-92 (11th Cir. 1995) (agreeing that state action element of due process claims is absent in private arbitration); *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (holding that arbitration was private, not state, action); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (finding that grievance procedure was not turned into government procedure); *Dluhos v. Strasberg*, No. 00-CV-3163, 2001 WL 1720272, at *5, 11 (D.N.J. Aug. 31, 2001) (finding decision to enforce trademark in arbitration proceedings cannot be state action), *aff'd in part*, 321 F.3d 365, 373 (3d Cir. 2003); *Century Aluminum v. United Steelworkers*, 82 F. Supp. 2d 580, 583 n.4 (S.D. W. Va. 2000) (noting that state action is absent in private arbitration); *Brannon v. Mass. Mut. Life Ins., Co.*, No. CIV A. 99-3497, 2000 WL 122241, at *5 (E.D. La. Jan. 31, 2000) (finding no need to consider claim due to lack of state action); *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 137-38 (S.D.N.Y. 1999) (finding that insufficient state action was exercised to trigger constitutional protections); *McDonough v. Equitable Life Assurance Soc'y*, No. 98 Civ. 3921 (BJJ), 1999 WL 731424, at *3 n.4 (S.D.N.Y. Sept. 20, 1999) (finding lack of state actor); *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734-35 (N.D. Tex. 1997) (finding challenged actions are those of private arbitrators); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1465-70 (N.D. Ill. 1997) (finding that all arguments put forth for state action fail); *Glennon v. Dean Witter Reynolds, Inc.*, No. 3-93-0847, 1994 WL 757709, at *10-13 (M.D. Tenn. Dec. 15, 1994) (finding no state action); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 973 (N.D. Ca. 1992) (finding that AAA was not state actor); *Austern v. Chi. Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (discussing claim for

ing the same issue has concluded that the opposite is true.⁶⁹ What accounts for this extraordinary dichotomy is not clear. Perhaps the muddled waters of the state action doctrine are responsible. More likely, the commentators interested in this issue, particularly Professors Reuben and Sternlight, are hopeful that encouraging the adoption of state action doctrine in arbitration will accomplish indirectly what has not been accomplished directly—a wholesale prohibition on the use of pre-dispute arbitration agreements between one-shot and repeat players, such as employers and employees.⁷⁰ Courts, by contrast, are enamored with the efficiency of arbitration and would prefer not to undermine the process through a finding of state action.

lack of state action); *In re Knepp*, 229 B.R. 821, 840-41 (Bankr. N.D. Ala. 1999) (expressing that bankruptcy court follows Eleventh Circuit law despite disagreement regarding arbitration as state action).

No state courts have found state action in private contractual arbitration. Only one state court suggests that a state action finding is possible. See *Williams v. O'Connor*, 310 N.W.2d 825, 826 (Mich. Ct. App. 1981) (suggesting state action is possible in statute-created arbitration panel). One federal district court stated in dicta that it “respectfully doubts that the rationale for this result set forth in *Davis* . . . viz. that an arbitration award involves no state action—is well founded.” *Commonwealth Assocs. v. Letsos*, 40 F. Supp. 2d 170, 177 n.37 (S.D.N.Y. 1999).

⁶⁹ See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 109, 112 (1992) (finding that under FAA, UAA, and state legislation, more than mere court enforcement is involved in arbitration); Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583 (1995) (discussing rationale for finding state action in some arbitration cases); Jeffery L. Fisher, *State Action and the Enforcement of Compulsory Arbitration Agreements Against Employment Discrimination Claims*, 18 HOFSTRA LAB. & EMP. L.J. 289, 292-96 (2000) (postulating that text of ADA and Civil Rights Act of 1991, encouraging arbitration, constitutes state action); Reuben, *supra* note 62, at 991 (assessing state action in ADR programs); Sternlight, *Rethinking*, *supra* note 65, at 40 (finding state action to extent Congress or courts are imposing preference for arbitration). But see Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 559-67 (1994) (analyzing applicability of state action doctrine in arbitral punitive damages situations).

⁷⁰ See, e.g., Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 1-10 (1994) (discussing disappointment with decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which Court rejected several of employee's arguments against New York Stock Exchange arbitration rules); Reuben, *supra* note 62, at 1032 (asserting that courts do not scrutinize repeat player/one-shot player agreements carefully enough); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) (finding that workers' rights are threatened by courts' treatment of arbitration).

This Article will not attempt to address the larger question Sternlight and Reuben pose, *i.e.*, whether state action is generally present when courts enforce arbitration agreements and awards. Instead, it will focus on a different, but potentially problematic, aspect of arbitration—whether the Supreme Court, applying the existing state action doctrine, will find that state action is present when the parties select the arbitrator who will decide their case. Understanding and then applying the Court's current views about state action, peremptory challenges and the arbitral process yields a clear result in the case of contractual arbitration—state action is not present. With respect to court-ordered arbitration, the answer is more difficult to glean but nevertheless ultimately clear—even when the court orders parties to participate in court-ordered arbitration, the private parties' use of peremptory challenges does not meet the requirements for state action as the Court has articulated them.

A. STATE ACTION DOCTRINE

The Supreme Court's state action doctrine explains that constitutional protections of individual rights and liberties apply only to the actions of governmental bodies.⁷¹ Unless the person or entity charged with a constitutional violation is acting on behalf of the state, no constitutional action against that person or entity can be maintained.⁷² The state action doctrine is important because it assures the maintenance of the public/private dichotomy that lies at the very heart of liberal democratic theory.⁷³ In order to maintain

⁷¹ See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (noting that private parties' actions lie outside scope of Constitution's protection generally).

⁷² See, e.g., *id.* at 624 (holding that private litigant's exercise of peremptory challenge invokes formal authority of court and is state action).

⁷³ See, e.g., JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 44-73 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1690) (discussing political and civil society distinction, origins of political society, ends of political society, and legislative power); Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1288-89 (2000) (finding that public/private distinction captures fundamental societal intuition); G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Government Responsibility (Part I)*, 34 HOUS. L. REV. 333, 336 (1997) (finding "myriad of fact situations in which the case for state responsibility in some form has greater or lesser appeal"); Erwin Chemerinsky,

the dichotomy, the state action doctrine dictates that courts must carefully consider the implications of extending to nongovernmental actors constitutional norms designed to limit governmental power. Proper consideration is essential to ensure that the boundaries between judicial and legislative authority are maintained,⁷⁴ that constitutional norms are not extended so far that they become liberty-infringing rather than liberty-enhancing,⁷⁵ and that federal governmental authority remains properly circumscribed.⁷⁶ At the same time, a state action doctrine is necessary so that private actors, acting on behalf of the state, do not infringe on or violate the rights of others.

Rethinking State Action, 80 NW. U. L. REV. 503, 535-36 (1985) (stating that state action doctrine protects individual liberty and state sovereignty); Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 209 (2001) (acknowledging need for jurisprudence allowing some private acts to be attributable to government).

⁷⁴ See *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936-37 (1982) (stating that court enforcement of state action transfers authority from legislative to judicial branch, rendering regulatory framework subject to judicial modification); *Costa del Moral v. Servicios Legales de Puerto Rico*, 63 F. Supp. 2d 165, 171-72 (D.P.R. 1999) (finding that "courts must respect the limits of their own power as directed against state governments and private interests"); *Parker v. Clarke*, 905 F. Supp. 638, 641-42 (E.D. Mo. 1995) (citing *Lugar's* discussion of reach of federal law and federal judicial power); *Total Television Entm't Corp. v. Chestnut Hill Village Assocs.*, 145 F.R.D. 375, 378-79 (E.D. Pa. 1992) (discussing state action requirement and citing *Lugar*); *Smith v. Wood*, 649 F. Supp. 901, 908 (E.D. Pa. 1986) (citing state action discussion from *Lugar*); *In re Estate of Johnson*, 460 N.Y.S.2d 932, 958 (N.Y. App. Div. 1983) (Niehoff, J., dissenting) (noting that state action principle requires courts to respect limits of power), *rev'd sub nom. In re Estate of Wilson*, 452 N.E.2d 1228 (N.Y. 1983).

⁷⁵ For example, procedural due process requirements that ensure governmental action is neither arbitrary nor capricious would greatly disrupt the operation of a private business or dispute resolution system. *Chemerinsky, supra* note 73, at 535-36 (stating that state action doctrine protects individual liberty by creating zone of conduct that need not comply with Constitution).

⁷⁶ See *Lugar*, 457 U.S. at 936 (asserting that adherence to state action requirement preserves individual freedom and avoids undue imposition of states); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (noting that "most rights secured by the Constitution are protected only against infringement by governments"); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (reiterating dichotomy between deprivation by state and deprivation by private conduct); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (affirming dichotomy set forth in Fourteenth Amendment between deprivations by state and by private conduct); *Cnty. Med. Ctr. v. Emergency Med. Servs. of N.E. Pa.*, 712 F.2d 878, 879 (3d Cir. 1983) (noting that "the Fifth and Fourteenth Amendments shield individuals only from government action"); *Elam v. Montgomery County*, 573 F. Supp. 797, 803 (S.D. Ohio 1983) (noting that only conduct fairly characterized as state action can violate Fourteenth Amendment); *Chemerinsky, supra* note 73, at 536 (arguing that limiting constitutional protections to state action preserves state sovereignty by allowing state to govern private behavior).

While the theory underlying state action is well-understood, determining whether an individual is a state actor when he allegedly violates constitutional rights is not easily predictable. As numerous commentators have stated, predicting when, and under what circumstances, state action exists is both one of the more difficult and important questions confronting the federal courts today.⁷⁷ This section will offer a basic outline of the Court's state action doctrine as it applies to peremptory challenges and then apply it to two different types of arbitration: court-ordered and contractual arbitration. The application of the state action doctrine in these contexts yields fairly clear results, suggesting that *Batson* challenges are not actionable in either form of arbitration.

The threshold inquiry in any case involving a private individual or entity accused of violating the Fourteenth Amendment is whether that private entity may be regarded as a state actor.⁷⁸ According to Supreme Court jurisprudence, private conduct becomes state action in three situations: First, state action exists when the government becomes excessively entangled with private behavior and encourages or causes the unconstitutional behavior.⁷⁹ Second, state action

⁷⁷ See Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (stating that state action is "conceptual disaster area"); Chemerinsky, *supra* note 73, at 503 (noting controversy over state action test); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 304 (1995) (applying state action test is difficult); Reuben, *supra* note 62, at 990 (noting that state action doctrine is often controversial); Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 Touro L. REV. 775, 776 (2000) (discussing problem in determining whether there is state action when government official is off job); Ware, *supra* note 69, at 559 (stating that determining what constitutes state action may be "the most important problem in American law"); R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685, 685 (1989) (stating that state action doctrine is conceptual disaster).

⁷⁸ See Krotoszynski, *supra* note 77, at 314 (noting that, for there to be state action by private entity, private entity's behavior must be attributable to state).

⁷⁹ See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (stating that state action exists where state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the state"); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holding that state was not responsible for nursing home decision to transfer patients even though state extensively regulated nursing homes); *Rendell-Baker v. Kohn*, 457 U.S. 830, 830 (1982) (holding that there is no close nexus between private school's personnel decisions and state even though state extensively regulates school); *Flagg Brothers*, 436 U.S. at 166 (allowing state to announce circumstances under which its courts will not interfere with private sale); *Jackson*, 419 U.S. at 357 (stating that utility company's exercise of choice allowed by state law does not make

exists when a private entity performs what is traditionally an exclusively public function.⁸⁰ Third, state action exists when the private actor and the government have a "symbiotic relationship."⁸¹

In the case of court-ordered and contractual arbitration, the only relevant categories are the first two: entanglement and public function.⁸² Thus, only those two state action tests will be addressed here.

state action where initiative comes from it and not from state); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) (noting that state is responsible for discriminatory private act when state has compelled the act by its laws); *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (stating that only by considering "on a case-by-case basis can 'nonobvious involvement of the State in private conduct [] be attributed its true significance' "); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1965) (noting that "where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations' " in order for there to be state action); *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001) (listing factors to consider in deciding whether private conduct can fairly be attributed to state); *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000) (stating that "state compulsion test" is factor in determining whether there has been state action); *DeBauche v. Trani*, 191 F.3d 499, 507 (4th Cir. 1999) (noting that private activity is not generally state action unless state has dominated activity).

⁸⁰ See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991) (noting importance of determining whether actor is performing traditional government function); *Rendell-Baker*, 457 U.S. at 842 (stating that question is whether function has been "traditionally exclusive prerogative of the state"); *Flagg Brothers*, 436 U.S. at 157 (noting argument that state had delegated traditional state power); *Jackson*, 419 U.S. at 353 (stating that supplying utility services is not traditionally exclusive power of state).

⁸¹ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

⁸² To establish a symbiotic relationship that turns a private entity into a state actor, courts engage in a "highly contextual" inquiry that focuses on whether the private entity receives state subsidies or aid. See *Burton*, 365 U.S. at 721-25 (emphasizing proper inquiry); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 123 (2000) (citing *J.K. v. Dillenberg*, 836 F. Supp. 694, 698 (D. Ariz. 1993)) (noting highly contextual nature of inquiry). In *Burton*, the Court emphasized that the correct inquiry involves "sifting facts and weighing circumstances" to determine if there is a symbiotic relationship. *Burton*, 365 U.S. at 729. The Court determined in *Burton* that the public funds provided to the facility, together with state agency ownership and operation, created a symbiotic relationship. *Id.* at 724. *Burton* was the high watermark for the symbiotic relationship test. *Id.* Today, the Court will find symbiotic relationships only in cases involving direct governmental aid to the alleged state actor. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 12.4, at 528 (6th ed. 2000) (listing categories of relationships between private actor and government used in determining whether there has been state action). In dispute resolution, direct government subsidies to the alleged wrongdoer, the arbitral litigant, are nonexistent. Even when the government pays the private third party neutral, application of the symbiotic relationship test would result in a finding that the arbitrator is a state actor, a fact that this Article concedes. Because no direct subsidy is provided to the arbitral litigants in court-ordered or contractual arbitration, the symbiotic relationship test is inapposite.

1. *Entanglement*. To determine whether entanglement exists, a court considers whether there is such a close nexus between the State and the challenged action that the action may be "fairly treated as that of the State itself."⁸³ Action taken by private entities with the mere approval or acquiescence of the State is not state action.⁸⁴ Instead, entanglement may be found if the challenged activity results from the State's provision of "significant encouragement, either overt or covert."⁸⁵

The question of whether the nexus is sufficiently close has always been a fact-intensive inquiry.⁸⁶ Nevertheless, certain principles guide Supreme Court jurisprudence. For example, a review of the cases suggests that the Court is more willing to find state action when a court must determine a party's skin color in order to ascertain the correct outcome under a proposed rule.⁸⁷ So, for instance, as discussed more fully below, enforcement of a private contract that prevents sales to African-Americans would entail state action (as it requires the court to ascertain a party's skin color to know whether the provision was violated), notwithstanding that the contractual provision itself was the result of choices made by seemingly private actors.⁸⁸ By contrast, the Court will not find state

⁸³ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citing *Jackson*, 419 U.S. at 351) (holding that state action may be found only if nexus between state and action exists); *Flagg Bros.*, 436 U.S. at 166 (finding lack of state action where state has refused to interfere with private sale); *Moose Lodge*, 407 U.S. at 173 (discussing need for state to have involved itself with discrimination); *Adickes*, 398 U.S. at 170 (noting that state is responsible for discriminatory act of private party when it compelled such act).

⁸⁴ *Blum*, 457 U.S. at 1005 ("That the state responds to such actions by adjusting benefits does not render it responsible for such actions."); *Flagg Bros.*, 436 U.S. at 164 (emphasizing that state's acquiescence in private action has not been found to convert that action into state action); *Jackson*, 419 U.S. at 357 (same).

⁸⁵ *Blum*, 459 U.S. at 1004 (citations omitted).

⁸⁶ See *Brentwood Acad.*, 531 U.S. at 295-96 (stating "no one fact can function as a necessary condition across the board for finding state action"); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982) (noting that state action determination is "necessarily fact-bound inquiry"); *Burton*, 365 U.S. at 726 (stating that state action finding "can be determined only in the framework of the peculiar facts or circumstances present"). See also *Jackson*, 419 U.S. at 349-50 (deciding whether there has been state action is often difficult); *Moose Lodge*, 407 U.S. at 172 (stating that deciding if particular discrimination is state action is not an easy task).

⁸⁷ *Shelley v. Kraemer*, 334 U.S. 1, 8-23 (1948).

⁸⁸ *Id.*

action when a party seeks to enforce a facially-neutral law but does so in a discriminatory manner (*e.g.*, a homeowner who only reports trespassing when the trespasser is Hispanic), perhaps on the notion that, because the court is not called upon expressly to participate in the racial decisionmaking (*i.e.*, the court need not ascertain a party's skin color to resolve the trespassing complaint), the nexus, and thus the entanglement, is more attenuated.⁸⁹ Consequently, an important factor in assessing the role of state action in arbitration and, in particular, racially-biased peremptory challenges in arbitration, will be the determination of the nature of the court's direct involvement in the racial decisionmaking.

In this section, the Article begins by analyzing the cases that most clearly elaborate the Court's jurisprudence on the intersection between race and state action: *Shelley v. Kraemer*,⁹⁰ *Bell v. Maryland*,⁹¹ and *Evans v. Abney*.⁹² After reconstructing the Court's basic state action framework in this area, the Article will then more closely examine those cases that are perhaps the closest factually to the discriminatory arbitral challenge area, namely those cases in which the Court has addressed whether a private litigant is a state actor when he exercises a peremptory challenge to a juror in court. Finally, this section will examine the application of these entanglement principles to the particular factual scenario that arbitration presents.

Shelley involved an attempt by landowners to enforce a racially restrictive covenant to prevent Shelley, an African-American, from taking possession of property subject to that covenant.⁹³ The Court concluded that a court engages in state action and violates the Fourteenth Amendment when it mandates that private persons comply with racially restrictive covenants when selling their property.⁹⁴ Thus, according to the Court in *Shelley*, a court is a state actor when it enforces a contract that requires racial discrimination.

⁸⁹ *Evans v. Abney*, 396 U.S. 435, 445 (1970); *Bell v. Maryland*, 378 U.S. 226 (1964).

⁹⁰ 334 U.S. 1 (1948).

⁹¹ 378 U.S. 226 (1964).

⁹² 396 U.S. 435 (1970).

⁹³ 334 U.S. at 5-6.

⁹⁴ *Id.* at 20.

Following *Shelley*, then, a judicial finding of entanglement is more likely when a court sanctions racial discrimination.⁹⁵

Many commentators worried about *Shelley*'s possible implications, and according to some commentators, *Shelley* could be interpreted to create state action in any contract dispute that results in court involvement.⁹⁶ The Court, perhaps concerned about the loss of the critical dichotomy between public and private law and the constitutionalization of contract law, has rejected the invitation to extend *Shelley*.⁹⁷ Since *Shelley*, no other case has found state

⁹⁵ *Id.*

⁹⁶ Some commentators caution against an extension of *Shelley*, fearing the consequences the constitutionalization of contract law would have on private interaction. See, e.g., Mark C. Alexander, *Attention Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 24 (1999) (finding that Court read state action requirement broadly in *Shelley*); Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 711 (1989) (discussing skepticism toward *Shelley* as constitutional precedent); Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 788 (1989) (asserting that opinion in *Shelley*, where court found state action, does not make sense); Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 474-79 (1962) (including criticism of *Shelley* decision); Kennedy, *supra* note 73, at 215 n.78 (calling *Shelley* controversial because it could be read to allow any court involvement in private dispute to qualify as state action); Krotoszynski, *supra* note 77, at 316 (proposing that under some interpretations of *Shelley* private disputes will be subject to constitutional restrictions); Shelley Ross Saxer, *Shelley v. Kramer's Fiftieth Anniversary: "A Time for Keeping; A Time for Throwing Away"*, 47 U. KAN. L. REV. 61, 83-84 (1998) (noting principal criticism of *Shelley*: that it would require all private agreements to satisfy constitutional standards); Steven Siegal, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 501 (1998) (noting that literal, unbound reading of *Shelley* could extend to all private transactions enforced by courts).

⁹⁷ *Bell*, 378 U.S. at 328 (Black, J., dissenting) (refusing to extend *Shelley*); *Evans*, 396 U.S. at 445 ("[T]he situation presented in this case is also easily distinguishable from that presented in *Shelley*"); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("[T]he holding of *Shelley*, however, has not been extended beyond the context of race discrimination."); *Jojola v. Wells Fargo Bank, N.A.*, No. C-71-900SAW, 1973 WL 158166, *4 (N.D. Cal. 1973) (same); Brunet, *supra* note 69, at 111 (*Shelley* limited to its facts). Judicial decisions that disadvantage racial minorities do not involve state action unless there is some non-neutral involvement of the court with the private action. *Bell*, 378 U.S. at 328 (Black, J., dissenting); *Evans*, 396 U.S. at 445. Thus, a court can uphold a trespass conviction based on a private person's decision not to allow racial minorities on his property. Because neither the state nor the court has "prompted or required" the private person's discriminatory behavior, state action does not arise. See NOWAK ET AL., *supra* note 82, § 12.3, at 521. By contrast, in *Shelley*, the court interfered in a private, non-discriminatory transaction, mandating a racial distinction in the sale of property. *Shelley*, 334 U.S. at 19.

action solely on the basis that the court enforced an otherwise private arrangement.⁹⁸

Both the Court and commentators have exaggerated *Shelley's* influence. If the contract the Court enforced in *Shelley* had not been racially restrictive *on its face*, the argument that applying *Shelley* in subsequent cases would constitutionalize contracts might be viable. Moreover, *Shelley* is an unusual case that will not likely be repeated. The decision turned on the finding that the court had to look at the color of Shelley's skin in order to determine whether to enforce the contract. Without race as a factor, the enforcement of a facially neutral covenant would not have been state action.⁹⁹

The Court's refusal to extend *Shelley* has resulted in a reluctance to find state action, even when race discrimination is a consequence of the private litigants' behavior. For example, in *Bell v. Maryland*, the Court considered whether a business owner could use state trespass laws to prosecute minorities who did not leave his premises after he refused to serve them.¹⁰⁰ While the Court vacated the trespass convictions on other grounds, the dissent, written by Justice Black, did not find state action because neither the state nor the court compelled the private person's discriminatory behavior.¹⁰¹ Although discriminatory enforcement of laws may result from the private person's actions, the government need not question the motives of the party seeking relief nor determine the alleged trespassers' skin color, in order to enforce the law. In other words, where a private actor utilizes a neutral law in a discriminatory manner, the Court will not find state action. A majority of the Court ultimately adopted Justice Black's *Bell* dissent and found that a

⁹⁸ See NOWAK ET AL., *supra* note 82, § 12.3, at 521 (discussing Court's failure to extend *Shelley*).

⁹⁹ Unlike other cases involving state exercise of coercive power, the *Shelley* case involved a court's enforcement of an covenant that was contrary to the wishes of both parties to the case and resulted in race discrimination. *Shelley*, 334 U.S. at 19. This element likely added to the Court's willingness to overturn the lower court decisions. As with the race aspect of *Shelley*, this aspect of the case is unusual and unlikely to be repeated.

¹⁰⁰ 378 U.S. 226 (1964).

¹⁰¹ *Id.* at 326.

private group or individual's decision to exclude minorities from one's premises did not amount to state action.¹⁰²

Similarly, in *Evans v. Abney*,¹⁰³ the Court considered whether state action exists when a court permits land to revert to descendants of a Senator who gave land for a public park on the condition that no members of a racial minority would be allowed in the park.¹⁰⁴ The Court found no state action.¹⁰⁵ While the city and park trustees could not run a park that limited admission based on race, reversion of the park to the Senator's heirs did not result in discrimination against black persons.¹⁰⁶ Instead, it resulted in discrimination against all people who might have benefitted from the use of the park.¹⁰⁷ Thus, the Court held, judicial enforcement of neutral state property laws is not state action.¹⁰⁸ As in *Bell*, the Court did not need to determine any party's skin color in order to enforce the law. From *Bell* and *Evans* evolves the principle, then, that judicial enforcement of neutral laws that may result in harm to minority groups does not involve state action unless the court must expressly participate in racial decisionmaking in order to resolve the dispute.

As these cases illustrate, the more involved the Court is in encouraging or sanctioning discriminatory behavior, the more likely the Court will find state action. Thus, it is not surprising that the Court viewed judicial oversight of the use of peremptory challenges to achieve discrimination inside the courtroom as state action. In two early 1990's cases, the Supreme Court extended the *Batson* principle to the civil litigation context¹⁰⁹ and to a criminal defendant's use of peremptory challenges.¹¹⁰ In *Edmonson v. Leesville Concrete Co., Inc.*,¹¹¹ and in *Georgia v. McCollum*,¹¹² the Supreme

¹⁰² *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (finding no state action where state does not encourage private club's decision to restrict membership based on race).

¹⁰³ 396 U.S. 435 (1970).

¹⁰⁴ *Id.* at 446.

¹⁰⁵ *Id.* at 445.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 446.

¹⁰⁸ *Id.* at 447.

¹⁰⁹ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991).

¹¹⁰ *Georgia v. McCollum*, 505 U.S. 42, 44 (1992).

¹¹¹ 500 U.S. 614 (1991).

¹¹² 505 U.S. 42 (1992).

Court applied a two-part inquiry to determine whether the discrimination at issue constituted state action when engaged in by either a civil litigant¹¹³ or a criminal defendant.¹¹⁴

First, the Court inquired into "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority."¹¹⁵ The Court concisely answered this question in the affirmative; the Court noted that the State need not grant any peremptory challenges to a civil litigant or a criminal defendant but in doing so invites a private party to help compose a government actor—the jury.¹¹⁶ "By their very nature, peremptory challenges have no significance outside of a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact."¹¹⁷ The Court emphasized that without the State's voluntary authorization of peremptory challenges, the private party would not be able to engage in the alleged discrimination.¹¹⁸

Second, the Court inquired into "whether the private party charged with the deprivation could be described in all fairness as a state actor."¹¹⁹ To resolve the latter issue the Court made three additional inquiries: "(1) 'the extent to which the actor relies on governmental assistance and benefits'; (2) 'whether the actor is performing a traditional government function'; and (3) 'whether the injury caused is aggravated in a unique way by the incidents of government authority.'"¹²⁰ With respect to both a civil litigant and a criminal defendant, the Court answered each of these questions in the affirmative.¹²¹

The Court reached this conclusion both because of the nature of jury selection and because of the court's involvement in the jury

¹¹³ *McCullum*, 515 U.S. at 44.

¹¹⁴ *Edmonson*, 500 U.S. at 615.

¹¹⁵ *McCullum*, 505 U.S. at 51 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)); *Edmonson*, 500 U.S. at 620.

¹¹⁶ *McCullum*, 505 U.S. at 51; *Edmonson*, 500 U.S. at 620-21.

¹¹⁷ *Edmonson*, 500 U.S. at 620.

¹¹⁸ *McCullum*, 505 U.S. at 51; *Edmonson*, 500 U.S. at 621.

¹¹⁹ *Edmonson*, 500 U.S. at 620. See also *McCullum*, 505 U.S. at 51 (providing similar language to describe second part of test).

¹²⁰ *McCullum*, 505 U.S. at 51 (quoting *Edmonson*, 500 U.S. at 621-22).

¹²¹ *Edmonson*, 500 U.S. at 622; *McCullum*, 505 U.S. at 51-52.

selection process. State action exists because the court “has not only made itself a party to the [biased act] but has elected to place its power, property and prestige behind the [alleged] discrimination.”¹²² In so doing, the government has “create[d] the legal framework governing the [challenged] conduct” and has in a significant way “involved itself with invidious discrimination.”¹²³ One proponent of a broad state action doctrine, Richard Reuben, argues that considered together, *Shelley* and *Edmonson* stand for the proposition that the court’s participation in enforcing an unlawful private arrangement that would “offend the Constitution if committed directly by the government” is state action; it aggravates the constitutional injury suffered in a “unique way because of the unique place of the courts in a democratic government”¹²⁴ In other words, the court’s unique position as an institution integral to our democratic society imposes on the court an obligation to avoid enforcing discriminatory arrangements.

Yet this view simply restates what the Court has rejected repeatedly since deciding *Shelley*, *Bell* and *Evans*—that the court’s involvement in enforcing neutral private arrangements is state action. Moreover, *Edmonson* is a much different case than *Shelley*.¹²⁵ The court’s involvement in *Edmonson* is of a deeper nature than in *Shelley*. In *Edmonson*, the parties are involved in the creation of the jury, which is “a quintessential governmental body.”¹²⁶ The jury will interact closely with the judge and will share decisionmaking functions with the judge. Permitting discriminatory jury selection impugns the function of the court system as well as affirming discriminatory behavior. Thus, the entanglement between judge and jury is much more intimate than between a judge and private parties attempting to enforce a contract that results in discrimination.

¹²² *Edmonson*, 500 U.S. at 624.

¹²³ *Id.* (citations omitted).

¹²⁴ Reuben, *supra* note 62, at 1008-09.

¹²⁵ In *Edmonson*, the Court made this point: “The alleged state action here is a far cry from that which the Court found, for example, in *Shelley v. Kraemer*.” 500 U.S. at 635.

¹²⁶ *Edmonson*, 500 U.S. at 624; see also *McCullum*, 505 U.S. at 52 (outlining essential procedures for jury creation).

Moreover, the discriminatory conduct in *Edmonson* took place in the courtroom itself, following procedures the court articulated.¹²⁷ That the government permits the discrimination to take place within a public courtroom, the court reasoned, exacerbates the injury caused by the discrimination in that it "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."¹²⁸ The role of the courts in our democracy requires that the courts act with institutional integrity when conducting proceedings. To maintain institutional integrity, a court must avoid the appearance of engaging in discriminatory behavior. A court cannot maintain its integrity if it presides over discriminatory action without attempting to prevent it. In addition, presiding over discriminatory behavior is quite different than using neutral legal principles to enforce a private contract without inquiring into the underlying subject matter of the contract. In such a situation, the court's integrity as an institution capable of applying neutral laws is not in jeopardy.

Finally, *Edmonson* is a case that involves significant state coercion. A juror is in court as a result of the issuance of a subpoena.¹²⁹ If a juror does not come to court in response to a judicial request for his presence, he can be held in contempt of court.¹³⁰ Thus, in *Edmonson*, the State coerces jurors into appearing in court, subjects them to public examination, compels them to remain and then permits discrimination against them.¹³¹ State acts of coercion, where the parties have no alternative to appearing or complying, are more likely to constitute state action. Coercion, together with race discrimination, rises to the level of state action.

¹²⁷ *Edmonson*, 500 U.S. at 616.

¹²⁸ *Edmonson*, 500 U.S. at 628 (citation omitted); see also *McCollum*, 505 U.S. at 53 ("Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State.").

¹²⁹ See, e.g., 28 U.S.C. § 1866(b), (g) (2003) (stating that jurors will be summoned to appear and, if they fail to appear, will be required to come to court and show good cause why they did not appear or be subject to fine or imprisonment).

¹³⁰ See, e.g., 42 PA. CONS. STAT. ANN. § 4132 (West 2003) (including jurors in group that can be punished for contempt).

¹³¹ *Edmonson*, 500 U.S. at 619.

If *Edmonson* is understood this way, the Court's subsequent decision in *Georgia v. McCollum*¹³² can more easily be explained. In *McCollum*, the Court held that state action exists when a criminal defendant uses a peremptory challenge to strike a juror based on race.¹³³ Although it is hard to imagine a less attractive candidate for state actor than a criminal defendant, the Supreme Court nevertheless found state action because the unconstitutional use of the peremptory challenge to build a state actor in the courtroom was more problematic than the *Shelley* Court's enforcement of a racially discriminatory contract.¹³⁴

Shelley, Bell, Evans, and Edmonson provide an appropriate framework to apply in answering the question of whether a private litigant's use of a peremptory challenge in arbitration is state action. While the analysis may change depending on the type of arbitration at issue, these decisions shed light on the likelihood of a finding of state action as they establish the parameters a court will use to analyze peremptory challenges in a private or semi-private arbitral setting.

2. *Public Function.* State action exists when a function that is traditionally an exclusive governmental service is delegated to a private actor.¹³⁵ Running a political primary¹³⁶ and managing a town¹³⁷ are both traditionally exclusive public functions that are, on occasion, delegated to private entities. When the government delegates, the question is at what point along the public/private dichotomy does the entity performing the delegated function become the state and therefore have to acknowledge and comply with the Constitution. In evaluating whether an entity is performing a "public function," a court considers whether the activity is one that

¹³² 505 U.S. at 42.

¹³³ *Id.*

¹³⁴ *Id.* at 52 (citing *Edmonson*, 500 U.S. at 624) (noting that when court enforces discriminatory peremptory challenge it "elect[s] to place its power, property and prestige behind the discrimination").

¹³⁵ See *Edmonson*, 500 U.S. at 621-25 (discussing required exercise of power traditionally reserved to state by private actor).

¹³⁶ *Terry v. Adams*, 345 U.S. 461, 469 (1953).

¹³⁷ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

is traditionally exclusively controlled by the state.¹³⁸ In other words, a private entity or person does not become a state actor simply by engaging in an activity that the government *could* perform—state action attaches only to those functions that the government *traditionally has* performed. Even if the private entity performs a task of extraordinary importance to society, state action cannot be found under the public function exception unless the action is also traditionally a function of the state.¹³⁹

The public function doctrine is relevant to the inquiry here because the Court used the doctrine in *Edmonson*.¹⁴⁰ To conclude that jury selection is a public function, the Court explained that jury selection involves creation of an entirely public entity.¹⁴¹ The power of the jury comes only from the court, which, in turn, receives its power from the government.¹⁴² As a result, even though selection of a particular juror may be privately motivated, the creation of the jury is the creation of a purely governmental body.¹⁴³ Moreover, the Court emphasized, the use of a peremptory challenge would be meaningless outside the court system.¹⁴⁴ Thus, the selection of jurors “represents a unique governmental function,” and when utilized by a private party is “attributable to the government for purposes of invoking constitutional protections”¹⁴⁵

¹³⁸ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974) (“[W]e have . . . found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the state.”); see also *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (concluding that function involved is not one traditionally exclusively reserved to state); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (finding question to be not just if private group serves a public function but also if function has been traditionally exclusive prerogative of state); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978) (finding that few public functions traditionally performed by state have been exclusively reserved to state).

¹³⁹ *Jackson*, 419 U.S. at 352-53 (noting that public utility is not state actor).

¹⁴⁰ 500 U.S. 614 (1991).

¹⁴¹ *Id.* at 624.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 623.

¹⁴⁵ *Id.* at 627. One might argue that *Edmonson* represents a limited revival of the public function doctrine because it appears to make a move away from the exclusivity requirement. Yet, a more likely explanation is that the Court believed the use of the word “exclusive” was unnecessary because juries are only selected in state controlled fora. Rather than describe jury selection as an exclusive state function, the Court indicates that it is a unique and traditional governmental function delegated to private litigants. While it may be that the Court’s omission of the word “exclusive” was intentional and the Court intends to move away

Following *Edmonson*, the Court applied its public function analysis in *McCollum*.¹⁴⁶ In concluding that the criminal defendant's use of a peremptory challenge was state action, the Court applied the same test it had used in *Edmonson*.¹⁴⁷ The *McCollum* case offers further support for the theory that the Court views creation of a jury as a traditional and exclusive public function.

Although these two cases might suggest that the Court is enamored with the public function doctrine, the opposite is true. In the absence of "exclusivity" and tradition, the Court rarely finds that a private activity is a state action.¹⁴⁸ The Court's unwillingness to find state action using the public function doctrine is best exemplified by its decision in *Jackson v. Metropolitan Edison Co.*¹⁴⁹ In that case, the Court firmly established that the public function doctrine applies only when the function at issue is traditionally an *exclusive* public function.¹⁵⁰ In *Jackson*, a customer claimed her due process rights were violated when the electric utility terminated her services without notice and a hearing.¹⁵¹ The Court held that no state action was present even though the state licensed the utility and had a virtual monopoly on provision of electrical services.¹⁵² According to the Court, only activities traditionally performed by or reserved to the state would constitute public functions.¹⁵³ Following *Jackson*, only the most fundamental and essential services govern-

from exclusivity as a requirement, the opposite explanation, that the Court simply did not believe it was necessary to describe the jury as exclusive, is more likely correct.

¹⁴⁶ *Georgia v. McCollum*, 505 U.S. 42, 51 (1992).

¹⁴⁷ *Id.* at 51.

¹⁴⁸ See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (recognizing that supplying utility services is not traditionally exclusive prerogative of state and refusing to expand public function doctrine).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 347.

¹⁵² *Id.* at 351-52.

¹⁵³ *Id.* at 352-53. The Court explicitly declined to extend the public function doctrine to industries "affected with a public interest." *Id.* at 354. The Court noted, [d]octors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status coverts their every action, absent more, into that of the State.

Id.

ments offer, which have no private sector counterparts, would seem to rise to the level of public function.¹⁵⁴

III. APPLICATION OF STATE ACTION IN ARBITRATION

Now that the basic framework for testing whether state action exists is in place, we will consider whether court-ordered and contractual arbitration rise to the level of state action. Because court-ordered arbitration involves considerably more state entanglement than contractual arbitration, each form of arbitration will be discussed separately and evaluated to determine whether state action is present. Once these two types of arbitration are explained, we will apply existing jurisprudence on peremptory challenges and state action to the arbitration context. We will conclude that litigants exercising peremptory challenges in either court-ordered or contractual arbitration are not state actors.

A. COURT-ORDERED ARBITRATION

Court-ordered arbitration provides for compulsory, non-binding arbitration in smaller federal civil actions, typically where damages claimed are less than \$150,000.¹⁵⁵ For example, in Arizona, a

¹⁵⁴ In *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978), the court held that a creditor's seizure of a debtor's property pursuant to a state statute was not state action because dispute resolution between debtors and creditors is not a public function. Although dispute resolution is traditionally a governmental function, it is not a public function because it is not an exclusive governmental activity. *Id.* at 161. Similarly, in *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), the Court concluded that education of maladjusted students is not state action because it is not an exclusive public function of the state.

¹⁵⁵ As of 1992, 22 of the 94 federal district courts and 33 states offered court-ordered arbitration. ELIZABETH FLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS FOR PROGRAM DESIGN (1992). By 1998, one quarter of federal district courts had created either court-ordered or voluntary arbitration programs. See Katherine V.W. Stone, Private Justice: The Law of Alternative Dispute Resolution 4 (2000). The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (1998), requires every federal district court to implement a dispute resolution program, which may include arbitration, and authorizes the court to create mandatory mediation programs. Court rules require arbitration in cases ranging from \$50,000 to \$150,000. See, e.g., D. ARIZ. CT. R. PRAC. 2.11 (mandating referral to arbitration where case does not exceed \$150,000); N.D. CAL. A.D.R. LOC. R. 4-2(b)(2) (referring to arbitration where damages sought do not exceed \$150,000); M.D. FLA. LOC. R. 8.02 (referring to arbitration where \$150,000 or less is involved); W.D. MICH. CIV. LOC. R. 16.6(b)(i) (setting \$100,000 limit); CAL. CIV. P. CODE § 1141.11 (West 2002) (setting amount in controversy limit at \$50,000).

federal district court will mandate referral to arbitration for most civil cases where the relief sought does not exceed \$150,000.¹⁵⁶ Similarly, in the Western District of Michigan, federal courts must order civil actions to arbitration if the amount in controversy does not exceed \$100,000.¹⁵⁷ In some jurisdictions, the court appoints the arbitrator or a panel of three arbitrators from a list the court created.¹⁵⁸ In other jurisdictions, the litigants select the arbitrator.¹⁵⁹ The court or the litigants typically pay the arbitrator fees, ranging from \$100 per day to up to \$300 per hour.¹⁶⁰ Parties may or may not be allowed to enter a peremptory challenge.¹⁶¹ The

¹⁵⁶ D. ARIZ. CT. R. PRAC. 2.11.

¹⁵⁷ W.D. MICH. CIV. LOC. R. 16.6(b)(i).

¹⁵⁸ See, e.g., M.D. GA. CIV. LOC. R. 16.2.2(a), 16.2.4(a) (stating that chief judge certifies arbitrators, and court administers arbitrator selection process).

¹⁵⁹ See, e.g., D. ARIZ. CT. R. PRAC. 2.11(d) (stating that parties may select arbitrator); W.D. MICH. CIV. LOC. R. 16.6(d) (stating that parties may select arbitrator from list court maintains, or court will appoint arbitrator); W.D. OKL. A.D.R. CIV. R. 16.3 Supp. 5.3 (stating that parties may select arbitrators from list supplied by court).

¹⁶⁰ In Florida, the court selects either one arbitrator or a panel of three arbitrators. FLA. STAT. ch. 44.103 (2003). Parties pay the arbitrators whose fees may not exceed \$200 per day. FLA. STAT. ch. 44.103(3) (2003). In Arizona, the Southern and Eastern Districts of New York, and the Western District of Michigan federal courts, the courts pay the arbitrator \$250 per day or \$250 per case, whichever is greater. D. ARIZ. CT. R. PRAC. 2.11(g); W.D. MICH. CIV. LOC. R. 16.6(d)(iii); E.D.N.Y. CIV. R. 83.10; W.D.N.Y. CIV. R. 83.10. In New Mexico and the United States District Court for the Eastern District of Pennsylvania, the federal courts pay the arbitrator \$100 per case. N.M. 2D JUD. DIST. LOC. R. 2-603 § IV(D); E.D. PA. LOC. R. DRV. P. 53.2.

¹⁶¹ In Arizona, for example, parties to an arbitration have ten days after notification of the arbitrator selected to exercise a peremptory strike. D. ARIZ. CT. R. PRAC. 2.11(d)(2). Under the Arizona federal district court rules, if one side exercises a peremptory strike, the arbitration clerk will appoint another arbitrator. *Id.* Only the side not exercising the first strike may peremptorily challenge the second arbitrator. *Id.* Each side is limited to one peremptory challenge per case. *Id.* See also CAL. CIV. P. CODE § 170.6 (West 2000) (providing that party may peremptorily challenge arbitrator); VT. STAT. ANN. tit. 12 § 7002(c) (2002) (providing for one or three peremptory challenges in voluntary arbitration, depending on the type of arbitrator); M.D. GA. CIV. LOC. R. 16.2.4(a) (allowing each party to strike one of three names court clerk submits); ALASKA BAR R. 37(h), 40(f)(10) (providing general rules for peremptory challenges of arbitrators); CAL. CT. R. 1605(a)(3) (stating that each side has ten days after notification of arbitrators selected by court administrator to reject one name on list); KY. ST. SUP. CT. R. 3.800(5)(B)(ii), 3.810(5)(B)(ii), 3.815(5)(B)(ii) (stating that each side has one peremptory strike for, respectively, legal negligence arbitration, legal fee arbitration, and arbitration between attorneys); N.M. 2D JUD. DIST. LOC. R. 2-603 § IV(C)(1)(b) (stating that after notice of court's arbitrator selection, each party has seven days to peremptorily strike one arbitrator); CAL. MADERA COUNTY SUPER. CT. R. 712 (granting each party right to disqualify one arbitrator peremptorily).

hearing may be held either in a courtroom,¹⁶² or in a room in the courthouse,¹⁶³ or outside of the courthouse—in a lawyer's office, for example.¹⁶⁴ Within some short period after the arbitration hearing, the arbitrator issues a written arbitration award that is filed with the court and served on the parties.¹⁶⁵ That award is entered as a final judgment unless the losing party requests a trial de novo shortly after the award is filed.¹⁶⁶

¹⁶² See, e.g., M.D. GA. CIV. LOC. R. 16.2.4(b) (stating that arbitration hearing will be held in a U.S. courthouse); S.D.N.Y. CIV. R. 83.10 (stating that arbitration will be in courthouse); E.D.N.Y. CIV. R. 83.10 (stating that arbitration hearing is to be held in courthouse).

¹⁶³ See, e.g., D. ARIZ. CT. R. PRAC. 2.11(i)(2) (stating that hearing is to be held in neutral location or room at a U.S. courthouse); N.D. CAL. A.D.R. LOC. R. 4-5(b) (stating that hearing may be held in any location including room in federal courthouse if available); E.D. PA. LOC. R. CIV. P. 53.2(b) (stating that arbitration will take place in courthouse).

¹⁶⁴ See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 900 (1991) (discussing that Northern District of California's court-ordered arbitration program holds hearings outside courtroom, while Eastern District of Pennsylvania's hearings take place in courtroom). In the Western District of Michigan, the hearing may be held anywhere within the Western District. W.D. MICH. CIV. LOC. R. 16.6(e)(ii). In New Mexico, the Northern District of Ohio, and the Northern District of California, the federal courts permit the arbitrator to select an appropriate time and location for the hearing. N.M.2D JUD. DIST. LOC. R. 2-603 § 5(B)(1); N.D. OHIO LOC. R. 16.7(2)(A); N.D. CAL. A.D.R. LOC. R. 4-1 to 4-5, 4-12. In Arizona, a neutral location is selected, but if a neutral location cannot be found, the arbitrator may ask the arbitration clerk for a room at a U.S. Courthouse facility. ARIZ. DIST. CIV. CT. R. 2.11(i)(2).

¹⁶⁵ See Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983) ("After hearing the testimony . . . the panel renders its decision by promptly filing an award with the clerk."); see also, e.g., D. ARIZ. R. CIV. P. 75(a) (giving arbitrator ten days to make award after receipt of objections by parties); CAL. IMPERIAL COUNTY SUPER. CT. LOC. R. 7.05 (granting arbitrator ten days, or twenty if there is extension, to make award); M.D. FLA. R. 8.05(a) (granting arbitrator ten days following hearing to issue award); KY. UNIF. LOC. R. BOONE, CAMPBELL, GALLATIN, KENTON COUNTIES GEN. CIV. R. Addendum A(O) (allowing arbitrator fifteen days to file award with court and mail to parties); MINN. GEN. R. 114.09(d)(i) (allotting arbitrator ten days to file award with court and mail to parties); E.D.N.Y. CIV. R. 83.10(g)(1) ("[T]he arbitrator award shall be filed with the court promptly after the hearing is concluded."); N.C. SUPER. CT. M.S.C.R. 12(D)(1) (granting arbitrator twenty days after end of hearing or after receipt of post-hearing briefs to render award); PA. PHILADELPHIA COUNTY CIV. P. R. 1300(B)(4) (granting arbitrator twenty-four hours to render decision); S.C. CIR. CT. A.D.R. R. 7(b)(1) (giving arbitrator five business days to write, sign, and serve award to parties and file with court); E.D. TENN. LOC. R. 16.5(m)(4) (providing arbitrator 150 days to hold arbitration hearing and render opinion).

¹⁶⁶ For example, in the Eastern District of Pennsylvania, either party may seek a trial de novo within thirty days after the filing of the award. E.D. PA. LOC. R. CIV. P. 53.2(6) (allowing either party to seek de novo trial within thirty days of filing of award); see also N.D. CAL. A.D.R. LOC. R. 4-12 (same); D. ARIZ. CT. R. PRAC. 2.11(j)(4) (same); W.D. MICH. CIV. LOC. R. 16.6(g)(iii) (same).

The state action requirement is satisfied when a court enforces a statute that mandates party participation in court-ordered arbitration.¹⁶⁷ When a court, pursuant to statutory authority, both compels parties to participate in costly and time-consuming proceedings regardless of their wishes and regulates the arbitral process, the actions of the arbitrator during the proceeding satisfy the state action requirement. But what about the use of peremptory challenges to achieve a discriminatory objective in arbitrator selection? Both *Edmonson v. Leesville Concrete Co.*¹⁶⁸ and *J.E.B. v. Alabama ex rel. T.B.*¹⁶⁹ illuminate this issue because they address whether a private litigant is a state actor when he peremptorily challenges a juror for racial or gender discriminatory reasons.¹⁷⁰

Edmonson and *J.E.B.* were close cases—each decided 6-3 with particularly strong dissenting opinions in *J.E.B.*¹⁷¹ Understanding the Court's reluctance to extend the state action doctrine to cases involving peremptory challenges, particularly when those challenges result in discrimination on the basis of gender, sheds light on the Court's willingness to extend state action into the arbitral context. In *Edmonson*, the Court found that a civil litigant is a state actor when he exercises a peremptory challenge for racially discriminatory reasons because the discriminatory challenge occurred *in the courtroom* and harmed the challenged jurors.¹⁷²

According to the Court, "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."¹⁷³ Public access to courtrooms aggravates this injury by subjecting jurors to public examination

¹⁶⁷ Reuben, *supra* note 62, at 998 ("[T]he statutory delegation of the judicial function to private arbitrators in arbitrations conducted under the FAA and related state laws transforms the conduct of those private adjudicators into state action. . . ."); Sternlight, *Rethinking*, *supra* note 65, at 40 ("Where a state or federal entity explicitly requires private parties to engage in binding arbitration it should be simple to prove state action."); Davis, *supra* note 69, at 605 ("[W]here the government compels private parties to engage in conduct, a finding of state action may be justified.").

¹⁶⁸ 500 U.S. 614 (1991).

¹⁶⁹ 511 U.S. 127 (1994).

¹⁷⁰ *Edmonson*, 500 U.S. at 616; *J.E.B.*, 511 U.S. at 128.

¹⁷¹ *J.E.B.*, 511 U.S. at 127; *Edmonson*, 500 U.S. at 615.

¹⁷² 500 U.S. at 624-25, 628.

¹⁷³ *Id.* at 628.

and scrutiny.¹⁷⁴ Moreover, the Court emphasized the unique court-created nature of peremptory challenges renders them meaningless outside the court system.¹⁷⁵ "Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose."¹⁷⁶ A court's implementation of its own legal framework in its own courtroom to affect involuntary participants in the judicial process is, therefore, state action.

Throughout the opinion, the Court also emphasized that the misuse of the peremptory challenge injures the challenged juror.¹⁷⁷ According to the Court, "[i]f peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system."¹⁷⁸ The Court found influential both that jury participation is compelled and that jurors are subjected to constraints on their freedom as well as public scrutiny as part of their jury service.¹⁷⁹ Finally, the court's role in enforcing a discriminatory peremptory challenge, through which it makes itself a party to the discriminatory act, was important in finding state action.¹⁸⁰ When the court as an institution appears to suborn racial discrimination through enforcement of the peremptory challenge, the case for state action is made.¹⁸¹

The Court was less easily convinced that gender, like race, is an inappropriate ground upon which to strike a juror. In *J.E.B.*, the Court held that a peremptory challenge used to achieve gender discrimination on a jury is unconstitutional state action.¹⁸² While the Court spent little energy discussing state action, its ultimate holding, that *Batson* applied to gender discrimination, reinforces the notion that state action is present when a litigant uses peremptory

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 624.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 628.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 624.

¹⁸⁰ *Id.* at 628.

¹⁸¹ *Id.*

¹⁸² *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 (1994).

challenges to create a jury.¹⁸³ *J.E.B.* makes clear that the Court views racial discrimination in jury selection more strongly than gender or other forms of discrimination and that, while state action is present in jury selection, it may not so easily extend beyond the unique nature of the jury selection process. The Court also emphasized that extending *Batson* to gender discrimination (and potentially other forms of discrimination) comes at great cost, both financial and practical.¹⁸⁴ According to Justice Scalia in dissent, "[t]he extension of *Batson* to sex and almost certainly beyond . . . will provide the basis for extensive collateral litigation"¹⁸⁵ Justice O'Connor, concurring in *J.E.B.*, and Justice Rehnquist, in a separate dissent, reiterated concerns about increased costs associated with *Batson* challenges.¹⁸⁶ These concerns, which will only increase in number if the Court sanctions challenges for alternative reasons, suggest that the Court is unlikely to extend its state action doctrine into non-judicial venues.¹⁸⁷ Moreover, if not all discriminatory peremptory challenges that occur *inside* a courtroom are state action,¹⁸⁸ it is unlikely that a court would find that peremptory challenges taking place *outside* the courtroom are state action.

Of course, some arbitration hearings do take place in a courtroom setting.¹⁸⁹ Even inside the courtroom, however, the concerns the Court articulated in the peremptory challenge cases nevertheless suggests that peremptory challenges in arbitration may not be subject to constitutional scrutiny. *Edmonson*, in particular, seems to turn on the compulsory nature of jury service and the court's role as an institution within society.¹⁹⁰ Yet arbitrators, unlike jurors, are

¹⁸³ *Id.* at 128.

¹⁸⁴ *Id.* at 162 (Scalia, J., dissenting) (discussing increasing litigation).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 147 (O'Connor, J., concurring); *id.* at 156 (Rehnquist, J., dissenting).

¹⁸⁷ In *J.E.B.*, Justices Scalia and Thomas and Chief Justice Rehnquist dissented. *Id.* at 127. Both Justices Kennedy and O'Connor filed concurring opinions. *Id.* Justice O'Connor's concurrence criticized the Court's decision to constitutionalize jury selection procedures, emphasizing both the confidential nature of the decision to make a peremptory challenge and the costs associated with increasing the number of *Batson* mini-hearings. *Id.* at 1431.

¹⁸⁸ See *Lege v. N.F. McCall Crews, Inc.*, 625 So. 2d 185, 189 (La. Ct. App. 1993) (rejecting party's claim that disability discrimination in juror selection is state action).

¹⁸⁹ See *supra* notes 162-63 and accompanying text (noting that in some jurisdictions, local rules require arbitration hearings to be held in courtroom or room in courthouse).

¹⁹⁰ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

not compelled to participate in arbitrations—they may always decline to serve.¹⁹¹ Moreover, they are not publicly examined or scrutinized. Arbitrator selection takes place in private and outside the courtroom setting.¹⁹² Typically, a party sends its peremptory challenges to the court clerk for processing.¹⁹³ Thus, the “rights” of an arbitrator need not receive protection in the same way a juror’s would.¹⁹⁴

Another concern raised in *Edmonson*, that the court is sanctioning the discriminatory behavior when it excuses the juror,¹⁹⁵ is not present in arbitration. Unlike juror selection, the judge never sees the arbitrator list.¹⁹⁶ The peremptory challenges and selection of the arbitrator occur through interaction among the parties and the court clerk.¹⁹⁷ Thus, the courts’ approval of a discriminatory peremptory challenge inside the courtroom, in front of the public and the jurors, is more harmful to courts’ institutional integrity than a private peremptory challenge in arbitration.

Nor does *Shelley v. Kraemer*¹⁹⁸ command that an arbitral litigant who makes a peremptory challenge for improper reasons be labeled a state actor. *Shelley* involved judicial enforcement of a facially

¹⁹¹ See 1 LARRY E. EDMONDSON, DOMKE ON COMMERCIAL ARBITRATION § 24.1 (3d ed. 2003) [hereinafter EDMONDSON] (“Arbitrators have an unqualified right to resign and cannot be forced by the courts to continue to serve if they are unwilling to do so.”).

¹⁹² M.D. FLA. R. 8.3(a) (allowing parties to select arbitrator); W.D. MICH. LOC. CIV. R. 16.6(d)(ii) (same); N.D. CAL. A.D.R. LOC. R. 4-4 (requiring parties to confer and select one arbitrator from list of ten).

¹⁹³ E.g., ARIZ. CT. R. PROC. 2.11(d)(2) (instructing that each party must notify arbitration clerk within ten days of arbitrator’s appointment that it will exercise peremptory strike of arbitrator); N.D. CAL. A.D.R. LOC. R. 4-4 (stating that each side is entitled to strike two names from clerk’s list of ten arbitrators and that within ten days of receipt of original list, parties shall list six names in order of preference and submit them to clerk).

¹⁹⁴ While an arbitrator’s rights are not prejudiced through the court-ordered arbitrator selection process, one might argue that the process prejudices the litigant’s rights. Although the litigant is delayed from appearing in court when its case is referred to arbitration, this delay is only temporary. A losing party may seek a trial de novo if it is displeased with the arbitrator’s decision.

¹⁹⁵ *Edmonson*, 500 U.S. at 624.

¹⁹⁶ See, e.g., M.D. FLA. R. 8.3(a) (instructing that parties or clerk select arbitrator); W.D. MICH. LOC. CIV. R. 16.6(d)(ii) (stating that parties select arbitrator from certified list and notify ADR Administrator of selected arbitrator’s name); D.N.J. LOCAL CIV. R. 201.1(e)(2) (providing that clerk selects arbitrator); E.D. PA. LOC. CIV. R. 53.2.4.B (stating that clerk selects three arbitrators from list of lawyers certified as arbitrators).

¹⁹⁷ See *supra* note 196 and accompanying text.

¹⁹⁸ 334 U.S. 1 (1948).

discriminatory contract.¹⁹⁹ In addition, it reversed the parties' wishes in order to achieve a discriminatory end.²⁰⁰ In the arbitration setting, a court first learns of an improper challenge when it reviews an arbitration award rendered by a neutral arbitrator.²⁰¹ While a litigant might argue that an improper arbitrator selection process tainted the award, neither a hearing transcript nor an award would reveal evidence to the court regarding the alleged improprieties. Thus, after taking testimony, a court would have no alternative but to use existing arbitration law, neutral on its face, to enforce an arbitration award that is neutral on its face. Even if enforcement of the award had a discriminatory effect, that effect is much more like the results in *Bell v. Maryland* and *Evans v. Abney*, where the Court held that judicial enforcement of neutral law was not state action, than like *Shelley*, where the court enforced a facially discriminatory contract.²⁰²

The Court's reluctance to extend *Batson* or *Shelley*, together with the absence of the compelling factors present in *Edmonson* or *J.E.B.*, suggest that the Court would be reluctant to find that a private litigant's exercise of a peremptory challenge for racially discriminatory or other reasons in a court-ordered arbitration would rise to the

¹⁹⁹ *Id.* at 4.

²⁰⁰ *Id.* at 20.

²⁰¹ Section 16 of the Federal Arbitration Act dramatically limits the extent to which a litigant in arbitration may appeal an arbitrator's interlocutory orders. 9 U.S.C. § 16 (2004). Section 16 states:

(a) An appeal may be taken from—(1) an order—(A) refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed, (C) denying an application under section 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award; (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or (3) a final decision with respect to an arbitration that is subject to this title. (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—(1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.

Id. Because arbitration decisions are appealable only if the decision is final, improper arbitrator selection would not be a basis for an interlocutory appeal. *Id.*

²⁰² *Evans v. Abney*, 396 U.S. 435, 454 (1970); *Bell v. Maryland*, 378 U.S. 226, 333 (1964); *Shelley*, 334 U.S. at 6.

level of state action. While the arbitrator's actions in court-ordered arbitration are state action because the parties are compelled to participate in the process, the private parties' decisions in arbitrator selection, taking place outside the courtroom with no compulsion of the arbitrators, are not.

B. CONTRACTUAL ARBITRATION

Contractual arbitration refers to any arrangement whereby parties agree that a disinterested private party will fashion a binding determination of a dispute that has arisen between them.²⁰³ The parties select the arbitrator who will resolve their case, typically making the selection after the dispute has arisen.²⁰⁴ The parties' active role in the selection process enables them to choose an arbitrator who is an expert in the subject matter of the dispute.²⁰⁵ Traditional arbitration also involves flexible procedures.

²⁰³ See 1 EDMONDSON, *supra* note 191, § 1.1 (defining arbitration). A typical statutory definition of arbitration appears in the Texas arbitration statute which says:

(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award. (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation.

TEX. CIV. PRAC. & REM. CODE ANN. § 154.027 (Vernon 1997).

²⁰⁴ See 1 EDMONDSON, *supra* note 191, § 24:1 (stating parties may choose arbitrator). Sometimes the arbitrator who will decide the dispute is named in the contract establishing arbitration as the dispute resolution mechanism. *Id.* § 24:1. Other times, parties simply state that an agency administering arbitration, such as the American Arbitration Association, will provide a panel of arbitrators from which an arbitrator will be chosen at the time the dispute arises. *Id.* § 24:2. Of course, even the latter selection method is, at some level of generality, one in which the parties select the arbitrator. They have simply elected to assign their selection powers to an agent.

²⁰⁵ See IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2.6.2 (1994) (stating that arbitrator is expected to be expert in norms governing resolution of dispute); see also *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974) (noting that parties select particular arbitrator "because they trust his knowledge and judgment concerning the demands" and customs of field from which dispute originates). It may be that in at least some cases, one of the parties will not want an expert to resolve the dispute. A party who has departed from industry norms in his performance, for instance, might prefer an arbitrator who is not an expert in the industry in which the party deals. In litigation, parties theoretically have little or no direct control over the particular judge who will decide their dispute (although plaintiffs do, of course, to a large extent, control the forum and thus can direct cases to fora that are perceived as more beneficial to plaintiffs). In arbitration, by contrast, a party might act opportunistically by selecting an arbitrator the party considers predisposed to the particular

The parties may choose the extent to which they wish to be bound by formal procedural rules and may define their own procedure.²⁰⁶ Arbitration proceedings, for instance, need not follow the rules of evidence and often limit,²⁰⁷ or even eliminate, discovery.²⁰⁸

These flexible procedures typically allow arbitration to proceed more rapidly than traditional courtroom litigation. The time between hearing and result is also shorter than in litigation because arbitrators are not required to publish their decisions and usually do not.²⁰⁹ It is also uncommon to have a transcript of the proceed-

argument the party will advance. In fact, one of us has argued elsewhere that the possibility of opportunistic behavior in arbitrator selection provides repeat players, with their better access to historical information and stronger incentives to influence the arbitrator, a decided advantage in the arbitral forum. See Sarah Rudolph Cole, *Incentives and Arbitration: A Case Against the Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 453 (1996).

²⁰⁶ Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-34 (1988).

²⁰⁷ UNIF. ARBITRATION ACT § 7 (1955). The Revised Uniform Arbitration Act gives arbitrators the authority to order discovery, unless the parties' agreement indicates otherwise. UNIF. ARBITRATION ACT § 17c (2000).

²⁰⁸ See JOHN S. MURRAY ET AL., *ARBITRATION* 217 (1996) (writing that "[a]nother illustration of the relative informality of arbitration is the sharply limited availability of discovery, both pre-trial and at the hearing itself"). The Uniform Arbitration Act does not provide for any form of pre-trial discovery. In fact, only the arbitrator has the power to order "discovery"—he may order it if he believes it is necessary to resolve the dispute; parties do not have a right to compel discovery. *Id.* at 218 (citing UNIF. ARBITRATION ACT § 7 (1955)). It is interesting to note that parties, when given the choice, tend to agree to eliminate or reduce the amount of discovery, especially in light of the far-ranging discovery that takes place in most formal judicial proceedings. The question emerges why discovery is so different in the two systems. That is, why does our formal judicial system allow for such wide-ranging discovery if it appears that litigants, when left to choose their own rules, opt for less discovery? There are at least two possible explanations for this deviation between the nature of discovery in the public and private dispute resolution systems: (1) little or no discovery is the better rule in cases where parties have an existing relationship (*i.e.*, the typical arbitration case), while broad ranging discovery is more appropriate in non-relationship based cases; or (2) the discovery rules enshrined in the federal rules of civil procedure (and therefore also the civil rules of the vast majority of states) resulted from a process of interest group capture (*i.e.*, by attorneys interested in increasing fees).

²⁰⁹ See, *e.g.*, *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (holding that arbitrators have no obligation to explain their award in writing). The American Arbitration Association's Commercial Arbitration Rules contain a provision requiring that arbitrators provide a written award to the parties but do not require the arbitrator to explain in writing or otherwise the reasons underlying that award. American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* (July 1, 2003), available at <http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPaid=37504>. See also EDWARD BRUNET & CHARLES B. CRAVER,

ings.²¹⁰ Because arbitrators rarely publish their opinions and are not obligated to follow precedent, an arbitral decision can be expected within days or weeks following the arbitration hearing.

A party may appeal the arbitrator's decision.²¹¹ Yet the Federal Arbitration Act (FAA), which governs arbitration procedure, restricts judicial review of arbitral awards.²¹² The FAA limits the grounds for refusing to enforce an arbitral award to procedural irregularities in the arbitral decisionmaking process, as when the arbitrator acts in excess of his authority.²¹³ A court may not reverse an arbitral award because the arbitrator misunderstood or misapplied the law.²¹⁴

Contractual arbitration, therefore, is traditionally a private party arrangement. Court involvement occurs, if at all, prior to the start of arbitration and after the completion of arbitration. Under the FAA, a party may obtain a stay of litigation pending an arbitration pursuant to a valid arbitration agreement.²¹⁵ The FAA also enables enforcement of an arbitration agreement by authorizing a party to the agreement to file in federal district court a motion to compel the other party to arbitrate.²¹⁶ Finally, the FAA contains provisions for limited judicial review of arbitral awards, together with provisions articulating the process for vacation or modification of arbitral awards.²¹⁷ The FAA does not provide procedures for interlocutory appeals of arbitrator decisions prior to, or during the course of, an

ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 324 (1997) (explaining that only in specialized arbitrations, like labor, international commercial and maritime arbitrations, do arbitrators write opinions); 1 EDMONDSON, *supra* note 191, § 34:1 (stating that parties to arbitration typically set time within which arbitrator must render his award); MACNEIL ET AL., *supra* note 205, § 2.6.2, at 2:37 (stating that arbitrators are not required to provide written opinion with reasons supporting their decisions).

²¹⁰ JOHN S. MURRAY ET AL., PROCESS OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 640 (2d ed. 1996).

²¹¹ 9 U.S.C. § 10(a)(1)-(4) (1992).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* Federal courts have created additional bases for judicial review of arbitral awards. See, e.g., *Halligan*, 148 F.3d at 202-03 (applying non-statutory ground for review of arbitral awards).

²¹⁵ 9 U.S.C. § 3 (1992).

²¹⁶ *Id.* § 4 (1992).

²¹⁷ See *id.* §§ 10-12 (1992).

arbitral hearing. Thus, governmental involvement is limited to judicial enforcement of the arbitration agreement or award.

1. *Applying Entanglement Jurisprudence to Contractual Arbitration.* In contractual arbitration, parties exercise peremptory challenges much the way they do in court-ordered arbitration. The primary differences are that the parties receive the list of arbitrators from a private organization, such as the American Arbitration Association (AAA), pay the arbitrators themselves, and hold the arbitrations far from the courtroom. Private litigants, even if they discriminate in arbitrator selection, are hardly perfect candidates for state action.

If the connections between private litigants exercising peremptory challenges in a court-ordered arbitration and the state are insufficient to create state action, neither should the less entangled relationship between private litigants in contractual arbitration and the courts create state action. Nevertheless, the question of state action in contractual arbitration is worth discussing because numerous commentators have argued that state action is present in contractual arbitration.

Proponents of finding state action in contractual arbitration have argued that the court's favorable treatment of arbitration is sufficient to satisfy the state action requirement for entanglement.²¹⁸ This argument overstates both the extent to which the federal courts maintain a policy favoring enforcement of arbitration agreements and misunderstands the entanglement doctrine. In numerous cases, the Court, and lower federal courts, describe a "healthy" or "strong" federal policy favoring arbitration.²¹⁹ This

²¹⁸ See, e.g., Brunet, *supra* note 69, at 109-12 ("Without the FAA and its pro-enforcement judicial interpretation, agreements to arbitrate would be meaningless."); Davis, *supra* note 69, at 610 (stating that state encouragement of and benefit from arbitration may constitute state action); Fisher, *supra* note 69, at 292 (noting Supreme Court recognition that statutes encouraging private conduct can represent state action); Sternlight, *Rethinking*, *supra* note 65, at 43 ("[T]he creation of an elaborate state enforcement mechanism, deliberately designed to allow enforcement of private agreements, does constitute state action."). See also FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 842-43 (9th Cir. 1987) (holding FAA's affect on arbitration insufficient to create state action).

²¹⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that FAA manifests "liberal federal policy favoring arbitration agreements"); see also, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (citing *Moses H. Cone Mem'l Hosp.*); *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 474 (1989) (finding that

"policy" does not encourage parties to agree to arbitrate. Instead, judicial reiteration of the policy simply assures parties that the court will enforce their contract on the same basis as it would enforce any other contract.²²⁰

Judicial reiteration of a pro-arbitration policy was necessary initially because federal courts were quite hostile toward arbitration.²²¹ In fact, until the early 1970s, federal courts clearly viewed arbitration of statutory claims with disfavor.²²² Thus, in part, the Court restates the policy favoring enforcement to remind parties that judicial hostility toward arbitration for the resolution of most claims is at an end. In addition, the policy favoring arbitration agreement enforcement is not a policy favoring arbitration but rather a policy favoring enforcement of contracts.²²³ The Court strongly believes in freedom of contract and reminds parties of that fact in cases involving arbitration.²²⁴ As the Court repeatedly states,

FAA was designed to overrule judicial refusal to enforce arbitration agreements); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (citing support for arbitration found in *Moses H. Cone Mem'l Hosp.*).

²²⁰ In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court emphasized that the entanglement test is satisfied only when the state encourages actual discrimination, not when the state practice merely facilitates or permits the discriminatory behavior. *Id.* at 380. Laws encouraging arbitration do not encourage discrimination, just as a trespass law does not encourage landowners to exclude persons from their property for racially discriminatory reasons.

²²¹ See, e.g., *Gilmer*, 500 U.S. at 24 (stating that FAA's purpose was to reverse longstanding judicial hostility toward arbitration agreements); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (concluding that purpose of FAA was to overrule judiciary's longstanding refusal to enforce arbitration agreements).

²²² See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (finding that Securities Act claims are not arbitrable); *Reader v. Hirsch & Co.*, 197 F. Supp. 111, 116 (S.D.N.Y. 1961) (determining that agreements to arbitrate future controversies arising under Securities Act were void).

²²³ See, e.g., *St. Mary's Med. Ctr., Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992).

²²⁴ Professor Sternlight contends that the Supreme Court's interpretation of the FAA forces courts to prefer arbitration over litigation in cases where the underlying agreement involves parties with unequal bargaining power, and she describes these kinds of contracts as "ambiguous" because she believes that the party with less bargaining power may not have voluntarily agreed to the terms of the contract. Sternlight, *Rethinking*, *supra* note 65, at 44-45. As a result, Sternlight claims that judicial enforcement of the FAA is not neutral. *Id.* This argument misunderstands the judicial approach to enforcement of contracts involving parties with unequal bargaining power. Rather than characterize these contracts as "ambiguous," courts treat contracts between parties with unequal bargaining power as enforceable and impose on the party challenging the contract the burden of proof to establish a contract defense, such as unconscionability. This framework for contract enforcement is

the FAA was intended to place arbitration agreements upon "the same footing as other contracts."²²⁵ Finally, the federal policy favoring arbitration is anything but absolute. Courts hold, for example, that the federal policy favoring arbitration yields when a more important federal policy, such as the federal policy in favor of ensuring that bankruptcy proceedings occur in bankruptcy court, conflicts.²²⁶ Thus, the Court's pro-arbitration policy is by no means insurmountable.

Even if the federal policy were as strong as proponents suggest, it is still merely a statement of policy. It would be a dangerous precedent to state that every time a court or other governmental actor announces a federal policy, state action exists when a private party attempts to carry out that policy. Substantially greater state action would exist if that were the case. For example, when the President encourages citizens to provide charitable assistance to others through religious institutions, under the theory espoused by proponents of a state action in arbitration theory, a private citizen's participation in such an endeavor would be state action and a violation of the Equal Protection Clause (and the Establishment Clause) if, for example, that action resulted in religious discrimination. Such an interpretation would undermine the state action doctrine as a tool for policing the distinction between public and private action.

identical to the framework the court applies when considering enforcement of an arbitration agreement. Thus, enforcement of the FAA framework is as neutral as judicial enforcement of other types of contracts. That no court views the judicial policy favoring enforcement of contracts under these conditions as state action suggests that the application of the judicial policy enforcing arbitration agreements is also not state action.

²²⁵ *Gilmer*, 500 U.S. at 24.

²²⁶ See, e.g., *Zimmerman v. Cont'l Airlines, Inc.*, 712 F.2d 55, 59 (3d Cir. 1983), cert. denied, 464 U.S. 1038 (1984) ("Bankruptcy proceedings, however, have long held a special place in the federal judicial system While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance."); *In re Barney's, Inc.*, 206 B.R. 336, 343 (Bankr. S.D.N.Y. 1997) (finding that countervailing policy in federal statute overrides federal policy favoring enforcement of arbitration agreements); *In re Spectrum Info. Techs., Inc.*, 183 B.R. 360, 363-64 (Bankr. E.D.N.Y. 1995) (citing cases where bankruptcy policy was held to outweigh arbitration policy). Other federal policies outweigh the federal policy favoring enforcement of arbitration agreements. See, e.g., *Allen v. Pacheco*, 71 P.3d 375, 384 (Colo. 2003) (determining that FAA does not preempt Colorado Health Care Availability Act, which regulates arbitration clauses in health care contracts); *Spitko*, *supra* note 5, at 1156 (stating that large majority of courts favor judicial resolution of child custody disputes and do not enforce arbitral awards respecting child custody or visitation).

Proponents of finding state action in arbitration might also contend that even if the court's enforcement of an arbitration agreement does not create state action, a court's enforcement of an arbitration award is state action if the arbitral process leading up to the issuance of the award is tainted, as when a party strikes an arbitrator from the proposed panel of arbitrators for racially discriminatory reasons. Application of traditional state action analysis does not, however, mandate a different result.

A court deciding whether state action exists when a party strikes an arbitrator for racially discriminatory reasons would first consider whether the applicable law is neutral. Application of the entanglement analysis, exemplified in *Bell v. Maryland*²²⁷ and *Evans v. Abney*,²²⁸ would have the court analyzing whether the enforcement of a facially neutral arbitration award amounts to state action. A state action finding would be surprising because, as in *Bell* and other cases, the arbitration award is like a contract—the arbitrator has created terms of a contract whereby one party agrees to do something for or pay something to the other party. The court's job is merely to enter the award as an order of the court. Because a court's review of an arbitration award is, by statute, very limited, the court plays virtually no role in enforcement of the award. The review is really a rubber stamp—only in the most egregious cases involving specific types of procedural irregularities or substantive mistakes would a court consider reversing an arbitration award.

Opponents might argue that the court's action in turning the award into a court order, violation of which could be punished by contempt, creates state action if the underlying arbitral process was tainted in some way. Yet enforcement of the arbitral award does not involve condoning racial discrimination. If a party exercised a peremptory challenge for racially discriminatory reasons, the effect of the improper challenge would not be evident in the award. Moreover, even if there was evidence that the ultimate decisionmaker was biased in some way, state action would still not be present because the arbitrator in a contractual arbitration is not

²²⁷ 378 U.S. 226 (1964).

²²⁸ 396 U.S. 435 (1970).

a state actor. Accordingly, judicial enforcement of the arbitration award does not create state action.

Moreover, as a practical matter, it is unclear how a party could challenge the discriminatory use of a peremptory challenge.²²⁹ Interlocutory appeals are unheard of during arbitration—the only time a court will hear challenges is before the arbitration or after the award is entered.²³⁰ The Court, enamored as it is with the efficiency of the arbitral process, seems unlikely to support undermining that efficiency by permitting interlocutory appeals after arbitrator selection or, for that matter, expanded challenges to arbitration awards. Finally, it is not easy to determine what the remedy for the misuse of a peremptory challenge should be.²³¹ Could damages be assessed? Would a more appropriate remedy be an arbitral rehearing? Damages or rehearing would make for an expensive win for the party against whom the discriminatory peremptory challenge was used. Given the limited nature of the harm and that, in a sense, the arbitrator is harmed more than the party, it seems unlikely that the Court would make actionable the discriminatory use of a peremptory challenge.

Even if the Court applied *Shelley*, an analogy between enforcement of a facially neutral arbitration award and enforcement of a facially discriminatory provision like the restrictive covenant at issue in *Shelley* is difficult to draw.²³² As discussed earlier, the Court has held that judicial decisions that disadvantage racial minorities do not involve state action unless the court must participate in the racial decisionmaking.²³³ *Edmonson* provides a

²²⁹ While there is no current mechanism to address improper peremptory challenges, this Article proposes a statute to address exactly this concern. See *infra* notes 369-404 and accompanying text.

²³⁰ See *supra* notes 215-17 and accompanying text.

²³¹ This Article recommends adoption of a statute that will address the issue of remedies for improper peremptory challenges that occur during arbitration. See *infra* notes 369-404 and accompanying text.

²³² “[T]he benign, unobtrusive federal policy favoring arbitration is unlike the tacit approval of racial discrimination found in *Reitman v. Mulkey*, where a statute granted landowners absolute discretion in deciding to whom to rent or sell property.” Davis, *supra* note 69, at 611.

²³³ See *supra* notes 100-03 and accompanying text (discussing cases where no state action was found).

compelling analogy.²³⁴ According to the *Edmonson* Court, the approval of the peremptory challenge is state action because the court "made itself a party to the [biased act and] . . . elected to place its power, property and prestige behind the [alleged] discrimination."²³⁵ The government both "create[d] the legal framework governing the [challenged] conduct," and in a significant way "has involved itself with invidious discrimination."²³⁶ Although similar to a peremptory challenge in arbitration, the major difference—that the court's approval of the peremptory challenge occurred in court, utilizing the court's power and involving the court in the discrimination—is dispositive. In the case of arbitration, a court would merely approve a facially neutral arbitration award. It would be difficult to describe the court's behavior in this latter case as significant involvement with invidious discrimination. Thus, applying any of the existing case law yields the same outcome.

2. *Public Function and Arbitration.* The best argument for finding state action in arbitration under the public function doctrine is that arbitration is traditionally an exclusive function of the state. In his article, Professor Reuben contends that binding dispute resolution, particularly arbitration, is "a traditionally exclusive public function."²³⁷ Reuben argues that because an arbitral ruling is enforceable only after a judge enters the award as a judgment according to the FAA or state arbitration laws, it does not operate independently from the state.²³⁸

Actual arbitration practice rebuts this argument. Arbitration began as an extra-judicial mechanism for resolving disputes.²³⁹ In fact, until Congress passed the FAA in 1925, courts did not typically enforce arbitration agreements and awards.²⁴⁰ Instead, parties

²³⁴ 500 U.S. 614 (1991).

²³⁵ 500 U.S. at 624.

²³⁶ *Id.* (citations omitted).

²³⁷ Reuben, *supra* note 62, at 997-98 (citing *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971)) (finding that state has "monopoly over techniques for binding conflict resolution").

²³⁸ Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 621-22 (1997). Reuben states that "the state-enforced resolution of disputes . . . distinguishes matters of constitutional moment from those of purely private concern." *Id.*

²³⁹ See 1 EDMONDSON, *supra* note 191, § 2:4. Cole, *supra* note 205, at 464-66 (describing arbitration's origins).

²⁴⁰ *Id.* § 2.5.

abided by agreements to arbitrate or arbitration awards out of fear that they would be ostracized from the commercial community and to preserve ongoing relationships.²⁴¹ Even after Congress enacted the FAA, groups continued to utilize arbitration and enforce arbitration awards without resort to the court.²⁴² Thus, the contention that dispute resolution is a unique function of the state seems inaccurate.²⁴³

The argument that parties may resort to the courts to enforce arbitration agreements or awards does not transform binding dispute resolution into a public function. Dispute resolution is different than the running of elections or education because the parties, not the government, delegate the power to the arbitrator to resolve the dispute.²⁴⁴ That the court may ultimately become involved in the dispute does not affect the analysis. Absent government delegation of the public function to a private entity, the Court will not find state action using the public function test.²⁴⁵

An analysis of existing case law demonstrates that state action is not present when a private litigant exercises a peremptory

²⁴¹ Cole, *supra* note 205, at 460.

²⁴² IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 4 (1992) (explaining that "[t]he word alternative means alternative to dispute resolution processes of the State—the judges, juries, administrative dispute resolvers, and the like of the State legal system"); Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 481 (1995) (stating that "while common law judges were apparently hostile toward arbitration in the late 1700s and early 1800s, arbitration was, nonetheless, widely practiced" and that "[a]rbitration actually was in widespread use in the United States almost three centuries before modern arbitration statutes were passed . . ."); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001) (describing cotton industry's private arbitral mechanism for resolving disputes); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) (describing diamond industry's use of arbitration to resolve disputes).

²⁴³ *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978). The Court would likely be reluctant to declare arbitration state action for another reason. According to the *Flagg Bros.* Court, "even if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a *particularly inappropriate* area into which to expand it." *Id.* (emphasis added).

²⁴⁴ See Buchanan, *supra* note 73, at 345 (discussing that public function issue considers question of how "governmental" activity delegated to private entity is).

²⁴⁵ See Davis, *supra* note 69, at 610 (arguing that judicial enforcement of arbitration agreement or award is not state action because no discriminatory impact on minorities occurs); see *supra* notes 87-99 and accompanying text (discussing nature of court's direct involvement in sanctioning discrimination).

challenge in an arbitral proceeding.²⁴⁶ Arguments to the contrary are unavailing because the factors present in those cases where state action is found—overt racial discrimination, compulsion of jurors, institutional integrity of the courts—are not at issue when a court evaluates an arbitral award that was written by an arbitrator who would not have been chosen but for a tainted selection process. While this Article proposes a variety of means to avoid or sanction improper peremptory challenges in the arbitral setting, it nevertheless concludes that state action analysis is not an appropriate means by which a litigant might achieve that laudatory goal.

IV. A PUBLIC POLICY ANALYSIS RESPECTING DISCRIMINATORY SELECTION OF AN ARBITRATOR

In this Part, we consider whether it contravenes public policy for a court to compel participation in an arbitration proceeding before an arbitrator selected on the basis of a characteristic that would not be a permissible basis for a peremptory strike in a public court proceeding²⁴⁷ or to enforce an arbitration award arising from an arbitration influenced by the discriminatory selection of an arbitrator. We divide our analysis into two parts: First, we consider whether existing case precedent militates against such compulsion or enforcement. Second, we consider the public policies that should inform our proposed model statute with respect to these points. In particular, and in light of these policies, we consider the circumstances in which a court should enforce a contract to participate in an arbitration proceeding that involves such a

²⁴⁶ See *supra* note 68 and accompanying text.

²⁴⁷ Our proposed model statute would not allow an interlocutory appeal of an arbitrator's ruling denying an arbitration party's *Batson*-like challenge to his selection (or the ruling by a panel of arbitrators on a challenge to the selection of any of them). See *infra* notes 397-98 and accompanying text (noting that there can be no challenge to arbitrator's qualifications or partiality until final arbitration award). A court might still confront this issue prior to the arbitrator's final award in the context of a motion to compel arbitration. Where one party to an arbitration contract brings a motion to compel arbitration, the party opposing the motion to compel arbitration might assert as a reason to deny the motion the actual or likely discriminatory selection of an arbitrator.

discriminatory selection of an arbitrator or enforce an arbitration award that involves a discriminatory selection of an arbitrator.

A. CONSIDERATION OF A PUBLIC POLICY CHALLENGE UNDER EXISTING CASE LAW

We begin by considering whether existing case law would support a court's refusal to enforce an arbitration contract or an arbitration award affected by discriminatory arbitrator selection. A court may refuse to enforce a contract that is contrary to law or public policy.²⁴⁸

That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.²⁴⁹

"While courts are hesitant to invalidate contracts on these public policy grounds, the public interest in freedom of contract is sometimes outweighed by other public policy considerations; in those cases the contract will not be enforced."²⁵⁰ Both within and outside of the arbitration context, courts have refused to enforce contracts in a variety of contexts and in light of a variety of public policies.²⁵¹

²⁴⁸ *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

²⁴⁹ *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987); see also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 784-85 (1996) ("[T]he true origin of the 'public policy' ground for vacatur [of commercial arbitration awards] lies in the doctrine of the common law of contracts that a court can refuse to enforce a contract if doing so would violate (a well-defined and dominant) public policy.").

²⁵⁰ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000).

²⁵¹ See, e.g., *Exxon Shipping Co. v. Exxon's Seamen's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (holding that public policy justified vacating arbitration award that ordered reinstatement of oil tanker worker who reported for work intoxicated); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (vacating on public policy grounds arbitrator's order to reinstate employee who engaged in acts of sexual harassment after being warned that further acts of sexual harassment would result in his termination); *A.Z.*, 725 N.E.2d at 1058-59 ("deriv[ing] from existing State laws and judicial precedent a

The issue then would seem to be whether a private disputant's selection or striking of an arbitrator based upon the arbitrator's race, sex, or other characteristic—the consideration of which *Batson* would not allow in juror selection—is illegal, immoral or otherwise harmful to the public's interests and, if so, whether a court should vindicate the public's interest in discouraging such behavior by refusing to enforce such a "tainted" arbitration contract or resulting arbitration award. Existing case law, however, suggests a tougher standard for invalidation. It suggests that a court should not refuse to enforce such a tainted contract or award based merely upon "general considerations of supposed public interests."²⁵² Specifically, in the context of an arbitrator's *interpretation of a contract*, the case law teaches that a court may refuse on public policy grounds to enforce a contract only when that contract as interpreted by the arbitrator violates an "explicit," "well defined and dominant" public policy that has been "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"²⁵³

To date, the Supreme Court has addressed public policy challenges to the enforcement of arbitration awards in three cases.²⁵⁴ Although these cases have arisen in the collective bargaining

public policy in [Massachusetts] that individuals shall not be compelled to enter into intimate family relationships" and holding that in light of this public policy "prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions"; *id.* at n.24 (citing cases arising in variety of contexts in which court refused to enforce contract because contract contravened public policy).

²⁵² *W.R. Grace & Co. v. Local Union 759*, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983).

²⁵³ *Id.* at 766. See also *Misco, Inc.*, 484 U.S. at 43:

[I]t is apparent that our decision in [*W.R. Grace & Co.*] does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. . . . At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

²⁵⁴ See generally *E. Associated Coal v. United Mine Workers*, 531 U.S. 57 (2000) (holding that public policy does not require nonenforcement of award); *Misco, Inc.*, 484 U.S. at 29 (holding that court exceeded authority in vacating arbitration award); *W.R. Grace & Co.*, 461 U.S. at 757 (finding that enforcement of arbitration award does not violate public policy).

context, lower courts apply the Court's holdings outside the collective bargaining context to all species of arbitration.²⁵⁵

The Court's opinions in this area have identified the outer boundaries of this public policy exception in the arbitration context.²⁵⁶ First, what matters is that the arbitration award itself violates a public policy.²⁵⁷ It is not sufficient that the conduct that gave rise to the dispute that is being arbitrated violates public policy.²⁵⁸ Second, it is not necessary that the arbitration award itself *violates or calls for the violation of* positive law in order for a court to invoke the public policy exception.²⁵⁹ It is sufficient that the award conflicts with a public policy embodied in such positive law.²⁶⁰ Third, it is not sufficient that the public policy which the court may

²⁵⁵ CARBONNEAU, *supra* note 57, at 500 ("In general, the courts ignore the decisional origins and intended specific application of the public policy exception, deeming it applicable in all cases involving the enforcement of arbitral awards."); Hayford, *supra* note 249, at 779 ("The well developed body of case law pertaining to the labor arbitration 'public policy exception' provides a ready source of authority and guidance to the circuit courts that choose to embrace this standard" in the commercial arbitration context); *id.* at 784 ("[T]he 'public policy' standard for vacatur of commercial arbitration awards has been adopted intact from the law of labor arbitration by a number of circuit courts with no attempt to reconcile the standard with the language of section 10(a) of the FAA."); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 92 (2000) ("The public policy standards developed in labor arbitration cases have been utilized by courts reviewing commercial and employment law arbitration awards.").

²⁵⁶ In *Eastern Associated Coal v. United Mine Workers*, 531 U.S. 57 (2000), the Supreme Court made clear the first two boundaries that we list. One may find many cases predating *Eastern Associated Coal* that take a broader or narrower approach. See David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 298 (2001) ("Some of these cases must be re-examined in light of *Eastern Associated Coal*, which clarified the appropriate inquiry for courts engaged in public policy review in a way which runs contrary to the approaches taken by some federal circuit courts."); Hodges, *supra* note 255, at 121-22 (reviewing many cases—prior to *Eastern Associated Coal*—in which courts set aside arbitration awards on public policy grounds and noting that these cases involved broad application of public policy doctrine, as well as focused on conduct that led to dispute rather than on arbitration award); Judith Stiltz Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?*, 20 HOFSTRA LAB. & EMPL. L.J. 87, 105 (2002) (noting that *Eastern Associated Coal*'s holding that public policy analysis must focus on arbitration award rather than on conduct that gave rise to dispute "is inconsistent with numerous court of appeals decisions, which adopted the broader view and which often vacated the awards").

²⁵⁷ *E. Associated Coal*, 531 U.S. at 62-63 (holding that "the question to be answered is not whether [the employee]'s drug use itself violates public policy, but whether the agreement to reinstate him does so").

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 63.

²⁶⁰ *Id.*

identify arises from common knowledge or common sense.²⁶¹ The public policy must be found in statutes, regulations or common law doctrines.²⁶²

In considering a public policy challenge to an arbitrator's interpretation of a contract, a court begins by reading the arbitration award back into the contract.²⁶³ That is, the court pretends that the arbitration award was an express term of the contract. Consider, for example, the facts of the most recent case in which the Supreme Court applied the public policy doctrine in the arbitration context. In *Eastern Associated Coal Corp. v. United Mine Workers*,²⁶⁴ Eastern brought an action to vacate an arbitration award ordering the reinstatement of a union member truck driver whose employment Eastern had terminated after the employee twice had tested positive for marijuana use.²⁶⁵ Eastern and the United Mine Workers were parties to a collective bargaining agreement that required Eastern to prove "just cause" to discharge a union employee and provided that an arbitrator would have the final say on whether or not just cause existed.²⁶⁶ In adjudicating Eastern's public policy challenge to the arbitration award ordering reinstatement, the Court read the arbitration award back into the contract: The Court assumed for the purposes of deciding the claim that the contract between Eastern and the union expressly called for the employee's reinstatement despite his having twice tested

²⁶¹ *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) (holding that although "policy against the operation of dangerous machinery while under the influence of drugs" was "firmly rooted in common sense," such "'general considerations of supposed public interests'" was by itself insufficient to set aside arbitration award on public policy grounds) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757 (1983)).

²⁶² Glanstein, *supra* note 256, at 299 ("What constitutes explicit, well-defined, and dominant public policy varies, but courts have held such policy exists when the alleged rule is expressed in statutes, regulations, or clear common law doctrines."); *see also id.* at 299-300, 300 n.14 (citing several cases in which court refused to overturn arbitration award after concluding that asserted public policy was "only expressed in the internal policies of an employer or trade association, or in general concerns about supposed public interests").

²⁶³ *See E. Associated Coal*, 531 U.S. at 62 (stating that Court "must treat the arbitrator's award as if it represented an agreement between [the contracting parties] as to the proper meaning of the contract's words").

²⁶⁴ *Id.* at 60-61.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

positive for marijuana during the course of his employment.²⁶⁷ In this way, an arbitration award is thought of as part of the contract that is the subject of the arbitration.²⁶⁸

Once a court so reads the contract, it must then ask whether that contract (as read) contravenes an "explicit," "well defined" and "dominant" public policy that the court is able to identify from existing statutes or case law, such that it would not be appropriate for the court to enforce the contract.²⁶⁹ Once again, *Eastern Associated Coal* illustrates the process. In that case the employer pointed to federal statutes and regulations explicitly aimed at eliminating the use of illegal drugs by persons in certain safety-sensitive positions, including truck drivers.²⁷⁰ This positive law called for drug testing of truck drivers, mandated suspension for truck drivers who had operated commercial vehicles while under the influence of drugs, and set out sanctions for drivers who had tested positive for drugs.²⁷¹ In light of this positive law, Eastern argued that the arbitrator's order to reinstate a truck driver who twice had tested positive for marijuana undermined the "strong public policy against drug use by transportation workers in safety-sensitive positions" embodied in this positive law.²⁷²

The Supreme Court rejected this argument.²⁷³ The Court pointed to provisions of the relevant statute that aimed to promote rehabilitation where "appropriate."²⁷⁴ The Court further noted that the relevant regulations put limits on the conditions under which an employer could reinstate a driver who had tested positive for drugs, but "[n]either the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice."²⁷⁵

²⁶⁷ *Id.* at 61-62.

²⁶⁸ *See id.* at 62 ("[W]e must treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the words 'just cause.'"); *id.* ("For present purposes, the award is not distinguishable from the contractual agreement.").

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 63-64.

²⁷¹ *Id.* at 64.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 65.

The Court considered both the policy against drug use by workers in safety-sensitive transportation positions and the policy favoring rehabilitation of such workers who have used drugs.²⁷⁶ It then held that the arbitrator's reinstatement order did not contravene these policies "taken together," pointing to the fact that "[t]he award violates no specific provision of any law or regulation."²⁷⁷ The Court's opinion suggests a great reluctance in this context to finding an "explicit," "well defined" and "dominant" public policy in more general positive law: "Neither Congress nor the Secretary [of Transportation] has seen fit to mandate the discharge of a worker who twice tests positive for drugs. We hesitate to infer a public policy in this area that goes beyond the careful and detailed scheme Congress and the Secretary have created."²⁷⁸

Eastern Associated Coal confirms that the scope of the public policy doctrine is quite narrow in the arbitration context.²⁷⁹ One commentator who, in the light of *Eastern Associated Coal*, reviewed the extensive case law addressing public policy challenges to arbitration awards, concluded that "while the Supreme Court in *Eastern Associated Coal* left open the door for successful public policy challenges absent express statutory prohibitions against the terms of the awards, there is clearly only limited chance for success absent positive law expressly militating against enforcement of an award."²⁸⁰

The issue at hand—enforcement of an arbitration contract or arbitration award tainted by the discriminatory selection of an arbitrator—fits somewhat awkwardly into this arbitration jurisprudence. The instant complaint is not strictly against the substance of an award but rather is against the process by which the award is

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 66.

²⁷⁸ *Id.* at 67.

²⁷⁹ See Paula A. Barran & Todd A. Hanchett, *Public Policy Challenges to Labor Arbitration Awards: Still a Safe Harbor for Silly Fact Finding?*, 38 WILLAMETTE L. REV. 233, 254 (2002) ("Eastern signaled the closing of the public policy door, leaving open only a narrow sliver."); Ogden, *supra* note 256, at 116 ("Eastern Associated Coal . . . demonstrate[s] that it will be difficult to have an arbitration award set aside.")

²⁸⁰ Glanstein, *supra* note 256, at 300. For reviews of cases applying *Eastern Associated Coal* to public policy challenges to arbitration awards, see Barran & Hanchett, *supra* note 279, at 254-57 (discussing recent cases decided since *Eastern Associated Coal*); Ogden, *supra* note 256, at 107-15 (discussing how lower courts find exceptions to *Eastern Associated Coal*).

to be made or came to be made. With respect to an arbitration award tainted by discriminatory selection of an arbitrator, the party opposing enforcement is not alleging that the *interpretation* of the contract violates public policy. Rather, he is alleging that the *selection of the interpreter* of the contract violates public policy.

A party to an arbitration contract should be able to assert a process-centered public policy claim. The notion that “the public’s interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements”²⁸¹ would seem to apply no less to process than to substance. Consider an extreme example: The parties have contracted for arbitration of any dispute that might arise between them. The contract further provides that evidentiary disputes during the arbitration shall be settled by duel. Due to the illegal nature of dueling, a court should not enforce such an agreement on public policy grounds.

When a party to an arbitration contract brings a public policy challenge to enforcement of the contract or a resulting arbitration award on the ground that the other party has selected an arbitrator on the basis of a characteristic that would not be a permissible basis in a public court proceeding, a court should read that allegation into the contract for the purposes of deciding the public policy challenge. The court should read the contract, therefore, as calling for the discriminatory selection of the arbitrator.²⁸² The issue then becomes whether enforcement of such a contract would violate public policy.

More specifically, the issue becomes whether enforcement of such a contract would violate an “explicit,” “well defined and dominant” public policy that has been “ascertained ‘by reference to the laws and legal precedents and not from general considerations of

²⁸¹ United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 42 (1987).

²⁸² At the same time, where the parties have not expressly agreed to such discriminatory selection, the court should not analyze the claim as one where both parties consented to the discrimination. While it may seem conceptually impossible, the court should view the contract as calling for the discriminatory selection of the arbitrator against the will of one of the parties to the contract. We discuss below how the public policy analysis is impacted when both or all parties to the dispute expressly consent to the discriminatory selection of an arbitrator. See *infra* notes 325-31, 334-39, 347-50, 354-58 and accompanying texts.

supposed public interests.' ²⁸³ With respect to arbitration, the standard for a public policy challenge to the enforcement of an arbitration award (or contract) should be identical whether the challenge is substantive (*i.e.*, the arbitrator's interpretation of the contract violates public policy), or procedural (*i.e.*, the selection of the interpreter of the contract violates public policy). This result is so because the arbitration-based policies implicated by one party's efforts to avoid the arbitration contract or award are the same in both cases.

Many parties who contract for arbitration do so out of a desire to resolve an actual or anticipated dispute in an expeditious and cost-efficient manner. ²⁸⁴ Limiting judicial review of an arbitrator's award is a part of this bargain and protects the parties' interests in limiting the time and emotional and financial costs needed to resolve their dispute. ²⁸⁵ A party's resort to litigation to overturn the arbitration contract or award should be allowed, therefore, only in well-defined and extreme circumstances. In the context of a public policy challenge to an arbitration award or contract, the Supreme

²⁸³ *W.R. Grace & Co., v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers*, 461 U.S. 757, 766 (1983); *see also Misco, Inc.*, 484 U.S. at 43 (quoting *W.R. Grace & Co.*).

²⁸⁴ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (stating that "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies"); *CARBONNEAU*, *supra* note 57, at 4 ("Parties generally engage in arbitration to achieve quicker results."); *Hayford*, *supra* note 249, at 740-41 ("In effect, the parties to a commercial arbitration proceeding agree to 'pay their quarters and take their chances' in an alternative adjudicative forum intended to provide a mode of dispute resolution that is less complex, less expensive, and more expeditious than traditional litigation.").

²⁸⁵ *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("Although [arbitration discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *CARBONNEAU*, *supra* note 57, at 4 ("The benefit of the bargain for expedient adjudication carries with it the prospect that expectations of procedural and substantive fairness will be frustrated, without the possibility of further recourse, when the arbitrators' adjudicatory conduct is disappointing or unprofessional); *Glanstein*, *supra* note 256, at 297 (commenting that "courts have only a limited role in reviewing arbitration decisions because excessive judicial interference would undermine the use of arbitration as an alternative means for settling disputes"); *Hodges*, *supra* note 255, at 93 ("Finality of arbitration awards is one of the substantial virtues of the arbitral system.").

Court has defined those circumstances as occurring only when the challenged contract or award offends an "explicit," "well defined and dominant" public policy.²⁸⁶

Statutory and case law set out an "explicit," "well defined and dominant" public policy against the use of race and sex in jury selection. According to 18 U.S.C. § 243, "[n]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."²⁸⁷ Moreover, the *Batson* line of cases, discussed above, holds that the Equal Protection Clause forbids a state actor from excluding a person from jury service on account of that person's race or sex.²⁸⁸

But this public policy is "explicit," "well defined and dominant" only for discriminatory *juror* selection. The statutory and case law on discriminatory juror selection does not address discriminatory selection of an arbitrator or other neutral. For the reasons set out below, we conclude that this positive law against discrimination in selecting a juror cannot support a successful public policy argument

²⁸⁶ *W.R. Grace & Co.*, 461 U.S. at 766.

²⁸⁷ 18 U.S.C. § 243 (2004); *see also, e.g.*, ALA. CODE § 12-16-56 (1995) ("A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status."); CAL. CIVIL PROC. CODE § 231.5 (West Supp. 2004) ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."); D.C. CODE ANN. § 11-1903 (2001)

(A citizen of the District of Columbia may not be excluded or disqualified from jury service as a grand or petit juror in the District of Columbia on account of race, color, religion, sex, national origin, ancestry, economic status, marital status, age, or (except as provided in this chapter) physical handicap.);

MASS. GEN. LAWS ANN. ch. 234A, § 3 (West 2000) ("No person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation. Physically handicapped persons shall serve except where the court finds such service is not feasible."); WIS. STAT. ANN. § 756.001(3) (West 2001)

(No person who is qualified and able to serve as a juror may be excluded from that service in any court of this state on the basis of sex, race, color, sexual orientation as defined in s. 111.32(13m), disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry or because of a physical condition.).

²⁸⁸ *See supra* notes 13-56 and accompanying text.

against enforcement of an arbitration contract or award involving the discriminatory selection of an arbitrator.

One could generalize from the policies set out in the context of juror selection to derive policies arguably applicable to selection of an arbitrator. For example, one might generalize from the *Batson* case law that the practice of discriminatory selection of an arbitrator may help maintain or exacerbate racial or other tensions that exist within society and, thereby, undermine the goal of a progression toward a society in which people are judged by their abilities and not by racial, gender, or other stereotypes.²⁸⁹ But we think such a generalization, and other generalizations that might be made from the positive law against discriminatory juror selection, would not satisfy the strict requirement that an arbitration contract or award not be struck on public policy grounds absent a finding that enforcement would violate an "explicit," "well defined and dominant" public policy that has been "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"²⁹⁰

Important differences exist between the nature of jury service and service as an arbitrator, and these differences suggest that public policy considerations necessarily differ from one context to the other. Jury service, in contrast to service as an arbitrator, is an important civic right.²⁹¹ "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."²⁹²

²⁸⁹ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.") (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.").

²⁹⁰ *W.R. Grace & Co.*, 461 U.S. at 766; see also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (discussing decision in *W.R. Grace & Co.*).

²⁹¹ See *infra* note 343 and accompanying text; see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992) ("The American jury is universally understood as an important institution of democratic government [and] [e]xclusion of any person from such an institution by reason of race does violence to centrally important constitutional ideals of equal access to government, quite apart from any particular effect on verdicts.").

²⁹² *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

Moreover, jury service serves a vital public interest in that it “preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.”²⁹³ Jury service is also an important civic duty. Jurors are called to serve by subpoena.²⁹⁴ The state coerces the potential juror’s appearance where the potential juror would be subject to discrimination. In contrast, an arbitrator is free to decline service.²⁹⁵ The jury, unlike an arbitrator or arbitration panel, is a “quintessential governmental body” which interacts with and shares decisionmaking authority with the judge.²⁹⁶ Thus, the relationship between the state and the decisionmaker is much closer in the case of a jury as contrasted with the case of an arbitrator. Finally, the jury is assembled, selected, and functions in the public courtroom and in public view under procedures promulgated by the state.²⁹⁷ Arbitrators, on the contrary, generally are chosen in private by a court clerk or arbitral organization and perform their duties in a private setting under procedures set by or adopted by the disputants themselves.²⁹⁸ Discrimination in juror selection, therefore, is much more likely to undermine the integrity of the judicial system.²⁹⁹ For all these reasons, we find it inappropriate to generalize from the positive law against discriminatory juror selection a public policy against discriminatory selection of an arbitrator.

No statute or body of case law similar to that addressing discriminatory juror selection speaks explicitly against discrimination in the selection of an arbitrator or other neutral. Arguably, the closest law on point has arisen in the context of contracts that

²⁹³ *Id.* at 407.

²⁹⁴ *See supra* notes 129-30 and accompanying text (discussing state coercion involved in assembling jury).

²⁹⁵ *See supra* note 191 and accompanying text.

²⁹⁶ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624-28 (discussing differences between private and governmental actors); *see also supra* note 126 and accompanying text.

²⁹⁷ *See supra* note 127 and accompanying text (discussing importance of fact that discrimination in jury selection takes place in courtroom).

²⁹⁸ *See supra* note 192 and accompanying text.

²⁹⁹ *See supra* note 128 and accompanying text (discussing effects of discrimination in juror selection).

provide for "egregiously unfair" procedures for selection of an arbitrator.³⁰⁰ But we think this case law also is too far removed from the issue at hand to support a public policy argument against enforcement of an arbitration contract or award "tainted" by the discriminatory selection of an arbitrator.

Hooters of America, Inc. v. Phillips provides an example of this case law.³⁰¹ In *Hooters of America, Inc.*, a Hooters restaurant and one of its employees, Annette Phillips, had entered into an arbitration contract that called for arbitration of any employment-related dispute that might arise between them.³⁰² The agreement further provided that the arbitration would be governed by rules and procedures that Hooters would promulgate "from time to time."³⁰³ After Phillips alleged that a Hooters official sexually harassed her in a manner prohibited by Title VII, Hooters moved to compel arbitration under Section 4 of the Federal Arbitration Act.³⁰⁴ Phillips opposed the motion on the grounds that the arbitration agreement was not enforceable.³⁰⁵

Among the procedures Hooters promulgated pursuant to the arbitration contract were rules for the selection of a three-person arbitration panel.³⁰⁶ Those rules provided that both Hooters and the employee were entitled to select one arbitrator from a list of potential arbitrators *drawn up by Hooters*.³⁰⁷ Those two arbitrators

³⁰⁰ See *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (holding that party to arbitration agreement "materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith"); *Graham v. Scissor Tail, Inc.*, 623 P.2d 165, 172-73 (Cal. 1981) (vacating arbitrator's award where arbitration agreement, which was contained in contract of adhesion, designated arbitrator who, "by reason of its status and identity, is presumptively biased in favor of one party"); *Cross & Brown Co. v. Nelson*, 167 N.Y.S.2d 573, 576 (N.Y. App. Div. 1957) (holding that arbitration agreement between employer and employee which called for employer to act as arbitrator "outrag[ed] public policy" and was void on its face); see also *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 308-09 (1986) (finding Union's arbitration procedure constitutionally inadequate because, among other things, "Union's unrestricted choice" of arbitrator did not ensure impartial decisionmaker).

³⁰¹ See *Hooters of Am., Inc.*, 173 F.3d at 940-41 (refusing to uphold arbitration contract).

³⁰² *Id.* at 936.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 938-39.

³⁰⁷ *Id.*

would then select a third arbitrator from the list *drawn up by Hooters*.³⁰⁸ The rules put no limits on whom Hooters might put on the list of potential arbitrators.³⁰⁹ As the court pointed out, the rules allowed Hooters to place on the list its managers and others with a financial or familial relationship with the company.³¹⁰ Moreover, the rules allowed Hooters to remove from the list any arbitrator that displeased it by ruling against it in an arbitration.³¹¹

The United States Court of Appeals for the Fourth Circuit found that these procedures were “crafted to ensure a biased decisionmaker.”³¹² The court further found that “[t]he Hooters rules when taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.”³¹³ As the parties had purported to contract for arbitration—a “neutral forum,”³¹⁴ the court refused to enforce the arbitration contract, holding that “the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties.”³¹⁵

Arguably, *Hooters of America, Inc.* and similar cases set out an “explicit,” “well defined and dominant” public policy against enforcement of arbitration agreements that provide for arbitrator selection procedures “inimical to fundamental notions of fairness.”³¹⁶

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 939.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 938.

³¹³ *Id.* Additional rules promulgated by Hooters required the employee to provide Hooters with a statement of her claim but did not require Hooters to file any responsive pleading; required the employee but not Hooters to list all fact witnesses and a summary of their relevant knowledge of the facts; allowed Hooters to expand the scope of the proceeding “to any matter” while barring the employee from raising any matter not included in her statement of claim; allowed Hooters but not the employee to move for summary judgment before a hearing was held; allowed Hooters but not the employee to record or transcribe the arbitration hearing; allowed Hooters but not the employee to move for a court to vacate or modify an arbitral award where the preponderance of the evidence suggested that the arbitrator exceeded his authority; and allowed Hooters but not the employee to cancel the arbitration agreement with thirty days notice. *Id.* at 938-39. Moreover, Hooters enjoyed the right to unilaterally modify its rules at any time including during the course of an arbitration hearing and without notice to the employee. *Id.*

³¹⁴ *Id.* at 938.

³¹⁵ *Id.* at 940.

³¹⁶ *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173-74 (Cal. 1981).

We do not believe, however, that discriminatory selection of an arbitrator is “inimical to fundamental notions of fairness.” That an arbitrator is selected or rejected because of his race or sex, for example, does not seem to us necessarily to “set up a dispute resolution process utterly lacking in the rudiments of even handedness”³¹⁷ or preclude a “neutral[] . . . proceeding.”³¹⁸ That an arbitrator has been so chosen does not evidence that he will not remain neutral as between the parties. As one of us has argued elsewhere:

That the [party to the dispute] share[s] a common minority culture with the arbitrator . . . should not alone disqualify the arbitrator from adjudicating the . . . contest. Although such a shared culture can be expected to give rise to greater understanding between the arbitrator and the [party], the arbitrator’s interest in the dispute might remain quite attenuated. Such a broad disqualification based on presumed cultural bias logically extended to other types of disputes would, for example, suggest that a female arbitrator may not fairly adjudicate a dispute regarding property division upon dissolution of a marriage or a female employee’s claim of heterosexual sexual harassment. Indeed, unless one is willing to posit that minority-culture arbitrators are meaningfully more culturally biased as compared with arbitrators from the majority culture, such inter-cultural disputes could be fairly arbitrated, under such a broad disqualification rule, only before panels on which none or all of the cultural subgroups is represented.³¹⁹

³¹⁷ *Hooters of Am., Inc.*, 173 F.3d at 935.

³¹⁸ *Id.* at 938.

³¹⁹ E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 312 (1999); see also *Smith v. Argenbright, Inc.*, No. 99C7368, 1999 WL 1270674, at *2 (N.D. Ill. Dec. 27, 1999) (holding that party to arbitration may not bring evident partiality claim until conclusion of arbitration proceeding and commenting that “we are extremely skeptical of [the arbitration party]’s ability to prove the substance of her claim—unfair bias as the inevitable result of the panel’s gender composition”); *Park v. First Union Brokerage Servs., Inc.*, 926 F. Supp. 1085, 1088-89 (M.D. Fla. 1996) (rejecting contention that arbitration

In sum, no “explicit,” “well defined and dominant” public policy against the discriminatory selection of an arbitrator may be ascertained from existing positive law. Therefore, a disputant’s public policy challenge to the enforcement of an arbitration contract or award involving such discriminatory arbitrator selection must fail. We turn next to the issue of whether the law should be amended to ban such discriminatory selection.

B. A PUBLIC POLICY ANALYSIS INFORMING OUR PROPOSED MODEL STATUTE

Although it may be inappropriate under present Supreme Court precedent to generalize from the statutory and case law relating to juror selection for the purposes of evaluating a public policy challenge to the enforcement of an arbitration contract or award, we think it is appropriate to do so for the purposes of considering what the law in this area *should* be. Moreover, we think it appropriate in drafting our proposed model statute governing discriminatory arbitrator selection to evaluate also “general considerations of supposed public interests.”³²⁰ We turn now to an exploration of those policies and interests and an evaluation of how such policies and interests should inform our model statute.

The Supreme Court has elucidated how discriminatory juror selection harms three distinct interested parties.³²¹ The affected parties are the litigant, the excluded juror (or more generally, the excluded decisionmaker), and the community.³²² We believe that any proposed statute relating to discriminatory selection of a private

organization’s alleged selection of arbitrator because of her sex supports finding of “evident partiality” where complaining party had “failed to demonstrate any [actual] evident partiality in the individual arbitrators that sat on the case”); *Hotel, Motel & Rest. Employees & Bartenders Union, Local 471, AFL-CIO v. P. & J.G. Enter., Inc.*, 731 F. Supp. 88, 92 (N.D.N.Y. 1990) (“Mere conclusory allegations by [the employer] that the arbitrator’s decisions were racially motivated or that the fact the two employees involved were white indicates prejudice in their favor, are insufficient to show ‘evident partiality’ on the part of the arbitrator.”).

³²⁰ *W.R. Grace & Co. v. Local Union 159, Int’l Union of United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

³²¹ See *supra* notes 37-48 and accompanying text.

³²² See *supra* notes 37-48 and accompanying text.

arbitrator should consider the effects of discriminatory selection on these three entities.

At times, the interests of these entities will conflict. These conflicts call for a balancing of interests. In structuring a proposed model statute, therefore, we as drafters must make normative choices.³²³

1. *The Interests of the Disputants.* Discriminatory selection of a decisionmaker impacts the litigants. The Supreme Court has noted that with discriminatory juror selection, the non-discriminating litigant is subjected to an increased risk that the judicial proceeding will be affected by the same prejudice that affected the selection of the jury.³²⁴ This risk is also present with discriminatory selection of an arbitrator.

At this point, we think it critical, however, to distinguish between consensual discrimination (discrimination to which all disputants have expressly consented) and non-consensual discrimination (discrimination to which at least one disputant has not expressly consented). We believe that as between the two types of cases, the harms to the affected entities differ in meaningful ways. Indeed, in considering each of the public policies that should inform our statute, we think it important to consider how the public policy analysis would differ in cases in which both or all parties to the dispute expressly consent to discriminatory selection of an arbitrator. We shall analyze, therefore, how discriminatory selection of an arbitrator impacts each affected entity in situations where, respectively, the disputants have not expressly consented to the discrimination and where they have so consented.

As noted above, with discriminatory selection of an arbitrator, the non-discriminating litigant is subjected to an increased risk that

³²³ See Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1179-80 (1994) (suggesting that it would be appropriate to focus on interests of society in maximizing public confidence in fairness of jury proceedings, when interest of defendant in diverse jury and interest of potential juror in race-neutral juror selection conflict); *id.* at 1201 (noting that empirical evidence is informative in deciding how to balance interests of defendants, potential jurors and society, but "[u]ltimately, . . . the questions judges must answer are not merely descriptive, they are also normative[; therefore,] [w]hen perceptions conflict, judges must decide whose trust is most essential to cultivate").

³²⁴ See *supra* note 40 and accompanying text.

the arbitration proceeding will be affected by the same prejudice that affected the selection of the arbitrator.³²⁵ In the Non-Consensual Scenario that we set out in the introduction to this Article,³²⁶ for example, the Jewish employee suffers an increased risk that the arbitration panel will be biased against a Jewish complainant or more sympathetic to Irish Catholic decisionmakers because the employer/respondent used a peremptory strike to remove a Jewish arbitrator and, in his stead, the arbitral organization appointed an Irish Catholic arbitrator. To put not too fine a point on the matter, we think it reasonable to posit that a Catholic is more likely to be anti-Semitic than is a Jew.³²⁷

In the case of a disputant who has expressly consented to the prejudice, however, it is the calculation and hope of the disputant that the proceeding will be affected by the prejudice. In the Consensual Scenario,³²⁸ for example, the husband and wife have not merely chosen to submit their dispute to a panel of arbitrators who will be knowledgeable about Jewish law. They have contracted to select arbitrators who share their Jewish faith.³²⁹ It is likely that the husband and wife have calculated that the Jewish arbitrators will be invested in the promotion of the Jewish religion—an interest that the disputants share at the time of their contracting. The parties have mutually calculated and contracted that the arbitration award will be informed by and faithful to that mutual interest. Therefore, where the parties have mutually and expressly consented to the discriminatory selection, the law need not be concerned with protecting *their* interest in a decision unaffected by the relevant prejudice, as the parties have no such interest.

³²⁵ See *supra* note 40 and accompanying text.

³²⁶ See *supra* notes 3-4 and accompanying text.

³²⁷ To be clear, we are not arguing that such a discriminatory selection of an arbitrator is likely to result in the empaneling of a prejudiced arbitrator or that a showing of such discriminatory selection would even come close to being sufficient to demonstrate actual bias on the part of an arbitrator. See *supra* notes 317-19 and accompanying text (asserting that discriminatory selection does not necessarily preclude neutral proceeding). We merely are asserting that such discriminatory selection makes the empaneling of a prejudiced or biased arbitrator more likely.

³²⁸ See *supra* note 5 and accompanying text.

³²⁹ Selection of an arbitrator because of his knowledge of Jewish law would not be discrimination on the basis of religion. Selection of an arbitrator because he is Jewish would be discrimination on the basis of religion.

A further unintended harm to the disputant who discriminates unilaterally or a disputant who has expressly consented to a discriminatory selection of a decisionmaker is the loss of esteem by the disputant flowing from the public perception that the dispute was resolved unfairly.³³⁰ We discuss this type of harm more fully below in considering harms to the community.³³¹ But whatever additional and even unintended harms might flow to the disputant from his own calculated and freely given choice to discriminate unilaterally or to consent to a "prejudiced" dispute resolution, we believe that such a disputant has assumed the risk of these harms. Therefore, the law need not be concerned with protecting *the disputant who discriminates unilaterally or consenting disputants* from these harms.

The law should consider and weigh the disputants' interests that the State furthers by not proscribing discriminatory selection of an arbitrator. Disputants who have selected arbitration as the method for resolving their dispute generally have a strong interest in the efficient and speedy resolution of their dispute.³³² The parties may have opted out of the traditional public court system specifically in order to reduce the time and financial and emotional costs needed to resolve their dispute.³³³

A prohibition on discriminatory selection of the arbitrator might compromise this interest in efficient and speedy dispute resolution. Such a prohibition would add an additional ground for seeking to avoid either a contract calling for arbitration or an arbitration award that the party finds unsatisfactory. As a result, delays are possible regardless of whether or not the discrimination was consensual and, indeed, whether or not any discrimination actually occurred.

As touched on above, disputants who have expressly consented to the discriminatory selection of an arbitrator may have done so

³³⁰ See *Powers v. Ohio*, 499 U.S. 400, 411-13 (1991) ("The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' . . . and places the fairness of a criminal proceeding in doubt." (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979))).

³³¹ See *infra* notes 357-58 and accompanying text.

³³² See *supra* note 284 and accompanying text.

³³³ See *supra* note 285 and accompanying text.

because they have an interest in seeing that the arbitrator who decides their case understands and respects their culture and applies this knowledge and attitude to the resolution of their dispute.³³⁴ As one of us has argued elsewhere:

[i]n a variety of contexts, cultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors). This is particularly true when cultural minorities attempt to use formal legal processes to give effect to choices which are inconsistent with prevailing community norms. In such cases, the substantive merit of their legal claims is at risk of being subjugated to majoritarian values, through a process that relies on members of the majority culture to vindicate the substantive rights at issue.³³⁵

³³⁴ See E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065 (1999) (defending merits of minority-culture arbitration) [hereinafter Spitko, *Judge Not*]; Spitko, *supra* note 319 (arguing that minority-culture litigants might avoid cultural biases of public courts by arbitrating their dispute before arbitration panel whose membership is selected to maximize likelihood that decisionmakers are sensitive to litigants' values and beliefs); see also Fred D. Butler, *The Question of Race, Gender & Culture in Mediator Selection*, 55 DISP. RESOL. J. 36, 38 (2001) (discussing need for "cultural competence" in mediators and noting that such competence extends beyond having the same race, sex, or gender as the parties or their advocates—

If you follow the current trend and belief of most lawyers that by using mediators who possess subject-matter expertise the chances of reaching resolution is greater, then it only follows that the use of mediators who understand the culture, race, or gender nuances or possess this expertise could achieve the same result in racially or culturally charged cases.);

Jessica R. Dominguez, *The Role of Latino Culture in Mediation of Family Disputes*, 1 J. LEGAL ADVOC. & PRAC. 154, 155 (1999) (discussing importance of lawyers and mediators "recognizing the different values Latina/o participants bring to the mediation process"); Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1808, 1820 (1993) (citing to empirical evidence supporting notion that race influences jurors' judgments and commenting that "if jurors share a defendant's race, they may be more likely to share some of the defendant's experiences and to understand his motivations, his context, and his language").

³³⁵ Spitko, *supra* note 319, at 275.

Discriminatory selection of an arbitrator is a means for minority-culture disputants to escape from the actual and perceived majoritarian biases of the public court system.³³⁶

Moreover, the utility for the disputants in being able to utilize a minority-culture neutral does not depend entirely upon that neutral *actually* understanding the culture at issue better than any particular neutral from outside the culture. There is added utility so long as the disputants *believe* that the neutral enjoys this understanding.³³⁷ A disputant who is arbitrating his dispute before such a neutral is more likely to accept an adverse outcome if he is comfortable with the process that he has received.³³⁸ The disputant's perception that the arbitrator heard and understood his case likely is essential to this comfort. Thus, where the disputant believes that an appreciation of and a respect for his minority culture is critical to an understanding of his case, his belief that the arbitrator did in fact appreciate and respect that culture will lead to his greater relative satisfaction with even an adverse arbitration award.³³⁹

³³⁶ But see Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1041 (1999) (arguing that use by cultural minorities of arbitration in attempt to avoid cultural biases of public court system "will only further cripple the ability of the public courts to earn the trust and confidence of particular cultural subgroups within the community").

³³⁷ See Butler, *supra* note 334, at 38 (positing that, in light of "history of racism, sexism, and the treatment of other cultures in this society . . . the parties may just need to identify with someone who looks like them . . . [and] this need should be understood and respected"); Spitko, *Judge Not*, *supra* note 334, at 1067-69 (asserting that distrust of judicial system by some minority-culture litigants arises from not only actual bias but also from perceived bias and from feared potential bias).

³³⁸ See King, *supra* note 323, at 1183 ("One of the central findings of procedural justice researchers is that procedures, independent of verdicts and sentences, influence the acceptance of criminal proceedings."); *id.* at 1183-84 ("Procedural fairness can persuade participants and observers to accept an outcome as fair even when that decision is not the one they would have preferred."); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 431 (1986) ("[I]f the parties have personally participated in selecting the neutral, they may be psychologically disposed to accept his statement of the case, whether it is a binding decision (as in arbitration) or an advisory opinion (as in a mini-trial)."); *id.* at 428 (speaking of mini-trial and postulating that "the presence at the hearing of a neutral advisor, to whom both parties have consented, enhances the prospect that they will credit any advisory opinion that he renders").

³³⁹ A similar dynamic holds in mediation. The mediator's likelihood of success in helping the parties resolve their dispute is in large part a function of his ability to build rapport and trust with the parties. See JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* 23 (2000) (positing that mediator "will be most effective

2. *The Interests of the Excluded Arbitrator.* Discriminatory selection of an arbitrator also affects the interests of the person or persons being excluded. The Supreme Court has pointed out that in the case of a *Batson* violation, the excluded juror is harmed in two ways: He is denied participation in jury service for reasons that do not relate to his ability to serve,³⁴⁰ and he is branded inferior by the discrimination.³⁴¹ Both of these means of harm to the decisionmaker or other neutral are potentially applicable in an arbitration.

With respect to the first type of harm—denial of the opportunity to serve for reasons unrelated to ability—the nature of the injury to the excluded arbitrator is similar in some ways to the nature of the injury to an excluded juror but differs from it in important ways. Most significantly, as noted above, jury service, in contrast to service as an arbitrator, is an important civic right.³⁴² Indeed, the

when the *parties* feel comfortable sharing with [the mediator] their suggestions for creative settlement solutions"); Lieberman & Henry, *supra* note 338, at 428 (noting that successful mediation requires that parties share intimate facts with mediator and "[b]y building on the parties' trust in the mediator, the process thus allows the parties to explore workable options[:]. With the knowledge that he gains, the mediator can learn how far apart the parties are and devise ways of bridging the gap"). When the disputants believe that their minority culture is relevant to an understanding of their dispute, their utilization of a mediator who they believe appreciates and respects that culture should help build rapport and trust and tend toward promoting settlement. See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1731 (1997) ("The strongest argument for gay and lesbian mediation, then, may be that couples who feel comfortable that lesbian and gay mediators are free from bias—even if they are sometimes mistaken in this belief . . .—may reach better agreements."). Again, this is likely to be true when the disputants *believe* that the neutral enjoys a special understanding of and respect for their culture regardless of whether he *actually* appreciates the culture at issue better than any particular neutral from outside the culture. See *id.* at 1742 (positing that "[e]ven apart from whether [gay and lesbian] couples will face less bias in gay and lesbian mediation, couples may feel more comfortable and reach better solutions merely because they feel more comfortable"). See also Butler, *supra* note 334, at 36 ("It is this empowerment of the parties that makes the [mediation] process work, and if the parties or their advocates believe that the race, sex, and gender of the mediator is important, then it is important."); Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 433 (1998) ("African Americans who *feel* that a mediator disrespects them may withdraw or become disruptive. In either event, the mediation session will be unproductive and efforts to mediate the family's issues could be thwarted.") (emphasis added).

³⁴⁰ See *supra* note 42 and accompanying text.

³⁴¹ See *supra* note 43 and accompanying text.

³⁴² See *supra* note 291 and accompanying text.

Supreme Court has noted that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."³⁴³

As the Supreme Court has balanced the rights of litigants against the rights of excluded jurors, it has weighed heavily this revered "honor and privilege" to serve as a juror: One commentator, after studying the *Batson* line of cases, concluded:

The United States Supreme Court's recent decisions reveal an implicit preference for the welfare of the individual juror, juxtaposed with the unbridled use of peremptory challenges by a litigant. In making the determination, the Court necessarily weighed the right to a fair and impartial jury against the harm to prospective jurors that are excluded by improper discriminatory strikes. In the battle between the rights of the litigants and of those they seek to persuade, the rights of the noncombatants prevail.³⁴⁴

That service as an arbitrator is not a revered civic duty and honor is itself an important justification for a reweighing of interests in the private dispute resolution context. One must add to the scale (in addition to the interests of the disputants discussed above and the interests of the community discussed below) two additional interests that the potential arbitrator has in avoiding discriminatory selection. First, unlike a potential juror, the potential arbitrator in many cases will have a significant pecuniary interest in serving as an arbitrator.³⁴⁵ And second, similar to a potential juror, and as the Supreme Court has noted in the juror context, the potential arbitrator has an interest in not being branded inferior by the discrimination.³⁴⁶

³⁴³ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

³⁴⁴ Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1003 (1994).

³⁴⁵ 1 EDMONDSON, *supra* note 191, § 5.12 (noting that arbitrators may charge reasonable fees for their services).

³⁴⁶ See *supra* note 43 and accompanying text (discussing brand of inferiority placed on juror who is subject of discrimination).

It seems that a disputant's motive for engaging in discriminatory selection of an arbitrator is a critical factor attaching to the weight that should be given to all of these interests that a potential arbitrator has in avoiding discriminatory selection and, importantly, also to the weight that should be given to the disputants' interest in engaging in such discrimination. We believe that a disputant's interest in discriminatory selection is least worthy of recognition when the motive for the discrimination is an animus toward the potential arbitrator's race or another protected characteristic. We further believe that the disputants' interest in discriminatory selection is most worthy of recognition when the motive for the discrimination is ensuring that the arbitrator understands and respects their culture and is able to apply this knowledge to the resolution of their dispute.³⁴⁷ Thus, where two heterosexual disputants discriminate against a lesbian arbitrator because of an animus toward lesbians, we would not highly value the disputants' interest in discriminatory selection. Where two lesbian disputants seek out a lesbian arbitrator to resolve their child custody and visitation dispute, we would highly value their interest in the discriminatory selection.³⁴⁸

An inverse relationship exists between the strength of the disputant's interests in discriminatory selection and the strength of the potential arbitrator's interest in avoiding discriminatory selection. That is, as the disputant's legitimate interest increases, the potential arbitrator's legitimate interest decreases. Where the disputant's interest in discriminatory selection is weakest—when the disputant is motivated by an animus toward the potential arbitrator's race or relationship to some other protected characteristic—the potential neutral is clearly being excluded for reasons wholly unrelated to his ability to serve, and, relatedly, he is most strongly branded inferior by the discrimination. Thus, the two

³⁴⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

³⁴⁸ See Spitko, *supra* note 5, at 1140-54 (explicating utility of child custody and visitation arbitration for lesbian co-parents and suggesting that lesbian "couple would be able to guard against some anti-minority ignorance and bias in the public court system by selecting an arbitrator who is familiar with lesbian co-parented families").

interests of an excluded juror that the Supreme Court has identified in the *Batson* context are most strongly implicated.³⁴⁹

But where the disputants' interest in discriminatory selection is strongest—when the motive for the discrimination is ensuring that the arbitrator understands and respects their culture and is able to apply this knowledge to the resolution of their dispute—the discriminatory selection is least likely to brand the excluded arbitrator as inferior, and relatedly, it is arguable that the excluded arbitrator has not been denied an opportunity to serve because of reasons *unrelated* to his ability to serve. As noted above, when the disputants believe that their minority culture is relevant to the resolution of their dispute, their confidence that the neutral enjoys a special appreciation of their minority culture may be critical to the settlement of their dispute or the parties' acceptance of an arbitrated resolution of their dispute.³⁵⁰ Exclusion under such circumstances does not send a powerful message of inferiority relating to the excluded neutral. In contrast, exclusion of a potential arbitrator on the basis of sexual orientation in the context of a commercial dispute between two homophobic disputants does send a powerful message of inferiority.

In general, therefore, we believe that, in balancing the interests of the disputants against those of a potential arbitrator relating to discriminatory selection of an arbitrator, the argument for allowing discriminatory selection of an arbitrator is strongest when the disputants have expressly consented to the discriminatory selection and the nature of the discrimination is related to the nature of the dispute. Still, there is another set of interests—those of the community—that should be taken into account. We consider those interests next.

3. *The Interests of the Community.* Discriminatory selection of an arbitrator also potentially impacts the larger community beyond the litigants and the excluded arbitrator. The Supreme Court has identified two harms that it has found the community suffers with respect to a *Batson* violation in juror selection: First, this practice

³⁴⁹ See *supra* notes 41-43 and accompanying text.

³⁵⁰ See *supra* notes 334-39 and accompanying text (discussing benefits of selecting minority-culture arbitrator).

perpetuates invidious stereotypes about the abilities of the excluded group.³⁵¹ Second, this practice undermines public confidence in our system of justice.³⁵² This is a serious charge. One might reasonably fear that this lessened confidence, in turn, might lead to a lessened obedience to law.³⁵³

With respect to this first type of harm, discriminatory selection of an arbitrator in a private dispute resolution has the potential to perpetuate invidious stereotypes no less than discriminatory selection of a juror.³⁵⁴ As discussed above, discriminatory selection of an arbitrator motivated by animus toward a protected characteristic sends a message of inferiority³⁵⁵—a message that certainly has the potential to perpetuate invidious stereotypes. For the reasons set out above, however, the potential for this type of harm is much less where the discriminatory selection is motivated by the disputants' efforts to select an arbitrator informed about a culture that is relevant to resolution of their dispute.³⁵⁶

With respect to the second type of harm, the Supreme Court has noted that the public's confidence in our system of justice is undermined when it comes to believe that "the 'deck has been stacked' in favor of one side" through inclusion of a partial jury.³⁵⁷ This means of harming the community's sense of justice travels largely intact into the context of an arbitration proceeding. For example, consider again our Non-Consensual Scenario, where the employer/respondent in a religious discrimination lawsuit has struck from the arbitration panel the sole arbitrator whom the employer perceives shares the employee/complainant's religious

³⁵¹ See *supra* notes 47-48 and accompanying text.

³⁵² See *supra* notes 45-46 and accompanying text.

³⁵³ See King, *supra* note 323, at 1180 n.12.

While theorists continue to debate whether law-abiding behavior is related to 'trust' or 'legitimacy' or to anything other than habit and self-interest, I am persuaded that the perceived legitimacy of legal institutions has an independent effect on obedience to law, even if that effect is not as significant as that of education or economic security.

Id.

³⁵⁴ We believe the public is less likely, however, to learn of the discriminatory selection of an arbitrator as contrasted with the discriminatory selection of a juror, given the private nature of arbitration.

³⁵⁵ See *supra* notes 346-50 and accompanying text.

³⁵⁶ See *supra* notes 346-50 and accompanying text.

³⁵⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

affiliation. Assuming that the public learns of this incident (or comes to know of others like it), the public's confidence in arbitration as an alternative yet fair process for dispute resolution might well be undermined.

We would not expect to see the same effect, however, in a case such as the Consensual Scenario. Where both disputants have expressly consented to the discriminatory selection of an arbitrator; the deck, even if the disputants have "stacked" it, presumably favors neither side in a way that is apparent. (Otherwise, the disputants would not both have expressly consented to the process.) Where a Jewish husband and wife agree that a panel of Jewish arbitrators will decide their divorce and custody dispute, the community will not perceive that the process unfairly favors either side. Because the community should not perceive that the deck has been stacked in favor of either side, this means of undermining the community's confidence in our system of justice is inapposite in a case such as the Consensual Scenario. Indeed, the community might even view the consensual discriminatory selection of an arbitrator as adding to the fairness of the dispute resolution proceeding if the community understands that the selection increases the chances that the arbitrator will apply the appropriate values to his resolution of the dispute.³⁵⁸

A second way in which discriminatory juror selection undermines the public's confidence in our system of justice is by lessening the community's voice in a public court proceeding. The public properly understands the jury as representing community interests and

³⁵⁸ See Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 49 (1994) (arguing that "just" verdicts result from ascertainment of true facts in case and application of law to those facts "in a way which is congruent with the customs, norms and values of the community"); see also King, *supra* note 323, at 1184 ("[T]here is some support for the claim that jury representativeness is one of those features that matters most to people when assessing the fairness of jury proceedings."); *id.* at 1181, 1188 (noting empirical research that suggests that racially representative juries enhance perceptions of jury fairness but commenting that empirical research does not speak to issues of how community would view race-based means for achieving that representativeness or how knowledge of such race-based means would impact perceptions of jury fairness).

values in criminal and civil litigation.³⁵⁹ Discriminatory juror selection misrepresents the community and distorts its voice.

This lessened and distorted voice itself undermines public confidence in the public system of justice. One commentator has explained the direct relationship between a lessened public voice in the justice system and a lessened public confidence in that system:

To be accepted, any system of adjudicating disputes must be seen by the parties as credible and just on a consistent basis. While credibility of the system is clearly connected to the perceived justice of its verdicts, the two qualities are not the same. A verdict perceived as just may emanate from a judicial system which has no credibility. On the other hand, an institution which produces an unjust verdict will not be repudiated if the mistaken verdict is seen as an exception to a series of essentially correct verdicts. What distinguishes the two qualities is that credibility addresses matters of composition and procedure, while the justice of verdicts emphasizes the outcome of the process. Including a community voice enhances the likelihood that the community will perceive the judicial system as credible and just.³⁶⁰

³⁵⁹ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) ("At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."); *United States v. Means*, 409 F. Supp. 115, 117 (D.N.D. 1976) (denying change of venue, in part because "[t]he interest of a community that those charged with violations of its laws, be tried in that community, is not a matter to be cast aside lightly"); Lisa Kern Griffin, *"The Image We See Is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 334 ("The jury represents the public's interests, but the deliberative process also tempers the anger and fear of the community and protects individual defendants from hasty judgments."); Van Ness, *supra* note 358, at 5, 11-12 ("[A] significant role of the jury from its inception has been to represent the interests and values of the community.").

³⁶⁰ Van Ness, *supra* note 358, at 47.

Unlike the harm of eroded public confidence, this second means of harming the community's sense of justice does *not* travel well into the context of an arbitration proceeding. To state the point most strongly, the public is not entitled to a voice in a private dispute resolution. To state the point less strongly, certainly the public is less entitled to a voice in a private dispute resolution relative to a jury proceeding.³⁶¹

The reasoning of the appellate court in *United States v. Nelson*³⁶² is instructive: In *Nelson*, the district court judge was concerned that the jury was not sufficiently racially and religiously diverse.³⁶³ With the parties' consent, the judge removed a white juror and replaced that juror and also an ill juror with a Jewish juror and an African-American one, in front of two non-African-American, non-Jewish jurors who were next in line.³⁶⁴

The appeals court held that what the district court had done was improper under *Batson* in light of the important public significance of the jury.³⁶⁵

[A]lthough the motives behind the district court's race- and religion-based jury selection procedures were undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary, that fact cannot justify the district court's race-conscious actions. The significance of a jury in our polity as a body chosen apart from racial and religious manipulations is too great to permit categorization by race or religion even from the best of intentions.³⁶⁶

The appeals court went on to opine that such consensual discriminatory selection of a decisionmaker would be acceptable, however, in a private arbitration because of the lessened public interest in a private dispute resolution proceeding:

³⁶¹ See *supra* note 359 and accompanying text (describing public interest in jury system).

³⁶² 277 F.3d 164 (2d Cir. 2002).

³⁶³ *Id.* at 207-08.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

Of course, parties can, in appropriate situations, opt out of the judicial system—say by agreeing to arbitration. And if they do so, they can choose arbiters of whatever racial or religious sorts they wish. But that is totally different from bending the *judicial system* to their racial and religious preferences. For, unlike private institutions, the judicial system belongs not to the parties but to the nation.³⁶⁷

It is this lessened community interest in private adjudication as contrasted with the public's interest in a public proceeding involving a jury that makes consensual discrimination in the context of an arbitration proceeding so much less objectionable than in the context of a public jury trial. While the jury traditionally has represented the community's interests and values in litigation, an arbitrator should not be viewed this way. Discriminatory selection of an arbitrator, therefore, impacts less the public voice. Consequently, such discriminatory selection in a private dispute resolution has less potential for undermining the public's confidence in the private system of justice. We believe, therefore, that there is a compelling argument for allowing parties to consent to a discriminatory selection of an arbitrator in certain circumstances, provided that no state or federal employment discrimination statute is implicated.³⁶⁸

³⁶⁷ *Id.* at 208-09.

³⁶⁸ See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 504-05 (7th Cir. 2000) [W]e do not suppose that there is anything in the law that would forbid private parties to stipulate to a mode of private dispute resolution that specified a particular gender composition of the tribunal, assuming the arbitrators are not employees of the American Arbitration Association or of some other dispute-resolution agency conducting the arbitration, which might bring Title VII into play.

Id.; see also *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) ("The existence of . . . third party preferences for discrimination does not, of course, justify discriminatory hiring practices."); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999) (noting that "[c]ourts have consistently rejected requests for a BFOQ based on customer preference" and discussing case law on point).

V. A MODEL STATUTE RESPECTING DISCRIMINATORY
SELECTION OF AN ARBITRATOR

A. TEXT OF THE PROPOSED STATUTE

In light of the policies we have discussed above and for the additional reasons set out below, we propose the following amendment to the Federal Arbitration Act and the Revised Uniform Arbitration Act (2000):

Section [17] [34]:³⁶⁹ Impermissible Discrimination in the Selection of an Arbitrator.

(a) [*Prohibition.*] No party to an arbitration shall discriminate in the selection of an arbitrator on the basis of the arbitrator's race, ethnicity, national origin, sex, religion, or sexual orientation.

(b) [*Exception to the Prohibition.*]

(1) The prohibition in Subsection (a) shall not apply in a case in which all disputants who are parties to the arbitration expressly consent to the discrimination and where the basis for the discrimination is pertinent to a material issue in the case.

(2) Parties to a tripartite arbitration agreement, which calls for each party to appoint one arbitrator to a three-arbitrator panel and for those two party-appointed arbitrators to select the third member of the arbitration panel, shall be deemed to have consented to the discriminatory selection of the arbitrators.

(c) [*Standing.*]

(1) One who is excluded from serving as an arbitrator in an arbitration shall have standing to demonstrate that such exclusion is in violation of this Section.

(2) A disputant who is a party to an arbitration shall have standing to demonstrate that an adverse disputant's selection or exclusion of an arbitrator is in violation of this Section.

(d) [*Standard of Proof.*] One who seeks a remedy under this Section must demonstrate by clear and convincing evidence that the

³⁶⁹ This section would be Section 17 if added to the end of the Federal Arbitration Act and would be Section 34 if added to the end of the Revised Uniform Arbitration Act.

selection or exclusion of the relevant arbitrator is in violation of this Section.

(e) [*Remedies.*]

(1) One who proves by clear and convincing evidence that he or she was excluded from serving as an arbitrator in an arbitration in violation of this Section may be awarded compensatory damages. Such money damages shall be his or her sole remedy.

(2) A disputant who is a party to an arbitration who proves by clear and convincing evidence that an adverse disputant's selection or exclusion of an arbitrator is in violation of this Section shall be entitled to vacatur of any arbitration ruling or award entered by that arbitrator or a panel on which that arbitrator served. The court shall then remand the case for further arbitration proceedings consistent with this Section. The court may award costs to the moving party incurred because of the arbitrator selection or exclusion in violation of this Section. The court may award costs to the responding party incurred because of the motion if the court finds that the motion when filed lacked probable cause.

(3) A respondent to a motion to compel arbitration who proves by clear and convincing evidence that the arbitration contract calls for or allows for an adverse disputant's selection or exclusion of an arbitrator in violation of this Section shall be entitled to an order enjoining such discriminatory selection or exclusion. The court, if convinced that a contract to arbitrate exists, shall then order arbitration proceedings consistent with this Section.

(f) [*Process.*]

(1) A disputant who is a party to an arbitration who has reason to believe that an adverse disputant's selection or exclusion of an arbitrator is in violation of this Section must notify the adverse disputant within seven days of his or her first having reason for such belief that he or she intends to challenge that selection. Failure to so notify the adverse disputant shall constitute waiver of any claim under this Section.

(2) A disputant who is a party to an arbitration who has reason to believe that an adverse disputant's selection or exclusion of an arbitrator is in violation of this Section must seek a hearing on the matter before the arbitrator or arbitration panel within fourteen days of his or her first having reason for such belief or within

fourteen days of the assignment of an arbitrator or arbitration panel to the case, whichever is later. Failure to move for such a hearing within this time frame shall constitute waiver of any claim under this Section, unless a final arbitration award is entered in the case prior to the expiration of the relevant fourteen-day period.

(3) Upon request from a disputant for a hearing on the matter of arbitrator selection alleged to be in violation of this Section, the arbitrator or arbitration panel shall hear evidence in the matter including testimony under oath from the attorneys and disputants involved in the alleged discriminatory selection or exclusion.

(4) If the arbitrator or arbitration panel is convinced by clear and convincing evidence that selection or exclusion of an arbitrator in the case is in violation of this Section, the arbitrator or arbitration panel shall order selection consistent with this Section of a replacement arbitrator or arbitrators for any arbitrator affected by such discriminatory selection and shall order removal of any arbitrator affected by such discriminatory selection. The arbitrator or arbitration panel may also award costs to the moving party incurred because of the arbitrator selection or exclusion in violation of this Section.

(5) A claim under this Section (by either an arbitrator or a disputant) may not be brought to a court before a final arbitration award is entered in the case. A claim under this Section (by either an arbitrator or a disputant) may not be brought to a court more than thirty days after a final arbitration award is entered in the case.

B. DISCUSSION OF THE PROPOSED STATUTE

Our proposed statute would ban discrimination in the selection of an arbitrator on the basis of race, ethnicity, national origin, sex, religion, or sexual orientation. In selecting these classifications, we have sought largely to mirror the classifications that the *Batson* principle encompasses. The sexual orientation classification arguably fits outside of the *Batson* principle under existing case law. We have included the sexual orientation classification within our prohibition, nevertheless, for the reasons set out below.

The Supreme Court has applied the *Batson* principle only in the context of race and sex discrimination.³⁷⁰ The Court has not considered the *Batson* principle in any other context. The Court's holdings and dicta in the *Batson* line of cases strongly suggest, however, that the Court would extend the *Batson* principle to other classifications that merit heightened scrutiny under the Equal Protection Clause but would not extend the principle beyond such classifications.

The Supreme Court stated in dicta in *J.E.B.* that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."³⁷¹ This dicta and the reasoning of *Batson* and *J.E.B.* suggest that the converse would hold: The *Batson* principle should extend to proscribe peremptory challenges on the basis of classifications, such as ethnicity, national origin, and religion, that receive heightened scrutiny in an equal protection challenge.³⁷² As

³⁷⁰ See *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (proscribing intentional discrimination on basis of race in exercise of peremptory challenge); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (extending *Batson* principle to proscribe intentional discrimination on basis of sex in exercise of peremptory challenge).

³⁷¹ *J.E.B.*, 511 U.S. at 143.

³⁷² See *Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting).

In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed 'heightened' or 'intermediate' scrutiny, *J.E.B.* would seem to have extended *Batson's* equal protection analysis to all strikes based on the latter category of classification—a category which presumably would include classifications based on religion.

Id.; *J.E.B.*, 511 U.S. at 161 (Scalia, J., dissenting) (arguing that reasoning of *J.E.B.* suggests that Equal Protection Clause forbids exercise of peremptory challenge based on religion); *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997).

[T]he same 'message' that the Supreme Court hoped to avoid with its decision to apply *Batson* to gender based peremptory strikes, namely that women would be unfit 'to decide important questions upon which reasonable persons could disagree,' is no less offensive to the notions of equal protection when applied to other classes which receive heightened scrutiny, which would presumably include religious denominations.

Id.; Underwood, *supra* note 291, at 765-66 (concluding that "[t]he ban on peremptory challenges based on group stereotypes should apply . . . to the small number of classifications that are suspect in the same way that race is: national origin, . . . religion, and probably gender, but probably not age, disability, occupation, education, or wealth").

The lower federal courts and the state courts that have considered the issue, however, have not been of one mind and have not uniformly so held. The courts have split over whether to permit a peremptory strike based on a potential juror's religious affiliation, as

Justice Scalia commented (disapprovingly) in dissent in *J.E.B.*, "[t]he core of the Court's reasoning [in *J.E.B.*] is that peremptory

distinguished from his religious beliefs. Compare *People v. Martin*, 64 Cal. App. 4th 378, 385 (Cal. Ct. App. 1998) (holding that Equal Protection Clause prohibits exercise of peremptory challenge on basis of religious affiliation but not religious belief), *State v. Hodge*, 726 A.2d 531, 552-53 (Conn. 1999) (distinguishing between discrimination on basis of religious affiliation and discrimination on basis of religious belief and holding that Equal Protection Clause prohibits exercise of peremptory challenge on basis of venireperson's religious affiliation but not such strike based on his religious belief), and *Thorson v. State*, 721 So. 2d 590, 595 (Miss. 1998) (holding, based solely on Mississippi constitution and statutory law, that it is permissible for "a party to strike a potential juror for her actual beliefs, even if that belief springs from her religion, [but] we will not allow challenges based solely on a potential jurors' religious affiliation"), with *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (finding that "religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historically ingrained in the jury selection process as is race" and holding that neither United States nor Minnesota constitutions requires extending *Batson* principle to religion), and *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1995) (conflating religious affiliation and religious belief and holding that discrimination in jury selection on basis of personal belief (and, therefore, religion) is permissible). See also *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991) ("Whether Jewish jurors are viewed as members of a 'race' . . . or a religion, a defendant's exercise of peremptory challenges against them is subject to *Batson*'s strictures."). While not disagreeing that *Batson* should extend to some discrimination based on ethnicity, courts have disagreed as to which particular ethnic groups should qualify for *Batson* protection. Compare *United States v. Biaggi*, 673 F. Supp. 96, 102 (E.D.N.Y. 1987) (concluding that "the Court in *Batson* meant 'cognizable racial groups' to include a variety of ethnic and ancestral groups subject to intentional discrimination, including Italian-Americans"), with *United States v. Marino*, 277 F.3d 11, 23 (1st Cir. 2002) (rejecting defendant's *Batson* challenge where defendant failed to show that Italian-Americans "are a group that faced or faces systematic discrimination").

Conversely, some courts have extended *Batson*-like protections to proscribe peremptory challenges on the basis of a classification that has not received heightened equal protection scrutiny. See *People v. Garcia*, 77 Cal. App. 4th 1269, 1272-74 (Cal. Ct. App. 2000) (becoming first court to proscribe exercise of peremptory challenge on basis of sexual orientation but basing its holding on provision of California constitution comparable to Sixth Amendment of United States Constitution rather than on equal protection principles); *People v. Green*, 561 N.Y.S.2d 130, 133 (1990) (holding that peremptory challenge based on potential juror's deafness lacked rational basis and, therefore, violated such potential juror's right to equal protection under New York State constitution); see also A.B. 2418, 1999-2000 Reg. Sess. (Cal. 2000) (codified at CAL. CIV. PROC. CODE §§ 204, 231.5 (West Supp. 2004) (codifying *Garcia* and expanding it to prohibit the use of peremptory strike based on potential juror's sexual orientation); *People v. Wheeler*, 583 P.2d 748, 758 (Cal. 1978) (stating that "the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article 1, section 16, of the California Constitution"); Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN'S L.J. 157, 162-71 (2001) (discussing *Garcia* decision and its arguable shortcomings). For a discussion of the extent to which a juror's sexual orientation is an appropriate topic for voir dire questioning and a permissible basis for a peremptory strike, see generally Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1 (2001).

challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause.³⁷³

The Supreme Court has not addressed whether sexual orientation classifications merit heightened equal protection scrutiny.³⁷⁴ One of us has argued elsewhere that sexual orientation classifications should receive such heightened scrutiny, as gays and lesbians have suffered a long history of discrimination even though their sexual orientation bears no relationship to their ability to contribute to society.³⁷⁵ The Supreme Court's recent opinion in *Lawrence v. Texas*,³⁷⁶ which overruled *Bowers v. Hardwick*,³⁷⁷ has strengthened this argument immensely.³⁷⁸ Our proposed statute, therefore, is

³⁷³ *J.E.B.*, 511 U.S. at 159 (Scalia, J., dissenting).

³⁷⁴ In *Romer v. Evans*, 517 U.S. 620, 631-36 (1996), the Supreme Court applied a rational basis review in invalidating a Colorado constitutional amendment which announced and prescribed that gay people shall not have any particular protections under the law of Colorado. *Romer*, 517 U.S. at 631-32. The issue of whether sexual orientation classifications merit heightened scrutiny was not argued to the Court, and the Court had no need to decide the issue, given its holding that Colorado's amendment failed even rational basis review. *See id.* at 640 n.1 (Scalia, J., dissenting) (noting that respondents did not appeal trial court's rejection of their argument "that homosexuals constitute a 'suspect' or 'quasi-suspect' class").

³⁷⁵ *See* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598-620 (1996).

³⁷⁶ 123 S. Ct. 2472, 2475 (2003) ("*Bowers* was not correct when it was decided, is not correct today and is hereby overruled.").

³⁷⁷ 478 U.S. 186, 196 (1986) (upholding sodomy law).

³⁷⁸ *See Lawrence*, 123 S. Ct. at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."). The federal courts of appeals that have considered whether sexual orientation classifications merit heightened scrutiny have decided this question in the negative. *See, e.g.*, Spitko, *supra* note 375, at 607-20 (citing and discussing case law). Those courts that have explained their holding have relied on *Bowers v. Hardwick* to support their conclusion that classifications based on sexual orientation are not suspect. *See* *Equality Found. v. Cincinnati*, 54 F.3d 261, 268 (6th Cir. 1995) ("*Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.'"); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) ("If the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'") (citing *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) ("If the Court [in *Bowers v. Hardwick*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990)

(If for federal analysis we must reach equal protection of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment . . . and

consistent with the position that sexual orientation classifications merit heightened equal protection scrutiny.

Our proposal to ban discrimination on these bases in most circumstances reflects our weighing of the relevant interests of society, potential arbitrators, and disputants relating to discriminatory selection, discussed fully in Part IV above.³⁷⁹ Society has interests in overcoming invidious stereotypes and in maintaining public confidence in our system of dispute resolution.³⁸⁰ The potential arbitrator may have a pecuniary interest in serving on the case.³⁸¹ He also has an interest in not being branded inferior by the discrimination.³⁸² Finally, the disputants have an interest in reducing the likelihood that their arbitral proceeding and the arbitrator's final decision will be affected by invidious discrimination³⁸³ and also have an interest in the public perception that they have resolved their dispute in a fair manner.³⁸⁴

if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment . . . it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.);

Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result."); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); see also *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (rejecting contention that "homosexuality is a suspect classification . . . for the reasons stated by the Fourth Circuit in *Thomasson v. Perry*"); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (stating without applying any criteria for qualification as suspect class that "[a] class comprised of service members who engage in or have a propensity to engage in [homosexual] acts is not inherently suspect" and citing *Steffan v. Perry*). *Lawrence v. Texas* dismantled this equal protection case law simultaneously as it overturned *Bowers* on due process grounds.

³⁷⁹ See *supra* notes 247-368 and accompanying text.

³⁸⁰ See *supra* notes 351-58 and accompanying text (analyzing community interests in non-discriminatory selection of arbitrator).

³⁸¹ See *supra* note 345 and accompanying text.

³⁸² See *supra* notes 340-50 and accompanying text (analyzing interests of excluded arbitrator).

³⁸³ See *supra* notes 324-27 and accompanying text.

³⁸⁴ See *supra* note 330 and accompanying text.

Against these interests, we weigh the disputants' interest in an efficient and expeditious resolution of their dispute.³⁸⁵ We are mindful that a ban on invidious discrimination in the selection of an arbitrator adds an avenue for appeal from an arbitrator's ruling and threatens to introduce additional costs and delays into the arbitration process.³⁸⁶ Nevertheless, we have concluded that, in light of the interests discussed above, the scales tip in favor of banning invidious discrimination in the selection of an arbitrator.

The disputants' mutual, express consent to the discriminatory selection of an arbitrator, however, alters the weighing of relevant interests. As an initial matter with respect to consent, we consider the parties to a tripartite arbitration agreement to have consented to the discriminatory selection of the arbitrators. A tripartite arbitration agreement calls for each party to appoint one arbitrator to a three-arbitrator panel and for those two party-appointed arbitrators to select the third member of the arbitration panel, known as the "neutral."³⁸⁷ The parties who agree to such a scheme accept that the opposing party may appoint even an arbitrator predisposed toward it.³⁸⁸ Thus, the parties have consented to allowing the opposing party to appoint an arbitrator whom the appointing party calculates will favor it for whatever reason. As Professor Thomas Carbonneau has explained:

It is generally assumed that the party-appointed arbitrators, although they may be required or expected to act impartially, will favor the designating party's case, leaving the neutral arbitrator to cast the deciding vote. The general expectation is that a party-designated arbitrator will represent its party's interest in the

³⁸⁵ See *supra* notes 332-33 and accompanying text.

³⁸⁶ See *supra* notes 333-34 and accompanying text.

³⁸⁷ See CARBONNEAU, *supra* note 57, at 6.

³⁸⁸ See SPECIAL COMM. ABA & COMM. AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VII(A)(1) (1997) (providing that party-appointed arbitrators "may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness"); see also *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (stating that parties to tripartite arbitration agreement "can ask [for] no more impartiality than inheres in the method they have chosen").

deliberations. This situation sometimes leads to "arbitrations-within-arbitrations," in which the party-appointed arbitrators make their case to the neutral arbitrator.³⁸⁹

Where the disputants have consented to a tripartite arbitration scheme or have expressly consented to the discriminatory selection of an arbitrator, the disputants themselves no longer can assert an interest in an arbitral process and decision unaffected by the relevant prejudice.³⁹⁰ Relatedly, society is unlikely to view an arbitration involving consensual discrimination as unfair to or "stacked against" either disputant.³⁹¹ Such consensual discrimination is less likely, therefore, to undermine public confidence in our system of dispute resolution.

Where the discrimination is pertinent to a material issue in the case, the disputants may have a legitimate interest in selecting an arbitrator who understands and respects their culture and is likely to apply this knowledge and attitude toward the resolution of their dispute.³⁹² In such a case, the discrimination is less likely to brand the excluded arbitrator as inferior.³⁹³ Relatedly, in such a case, the discrimination is less likely to perpetuate invidious stereotypes.³⁹⁴

For all these reasons, we find the case for allowing discriminatory selection to be stronger when the disputants have expressly consented to the discrimination. When the consensual discrimination is also pertinent to a material issue in the case, we find the disputants' interests in such discrimination to be sufficiently important and the interests of society and the excluded arbitrator to be sufficiently attenuated that such discrimination should be allowed. Our proposed statute, therefore, excludes from the general prohibition against discriminatory selection of an arbitrator those cases in which all disputants who are parties to the arbitration expressly consent to the discriminatory selection and where the

³⁸⁹ CARBONNEAU, *supra* note 57, at 6.

³⁹⁰ See *supra* notes 325-31 and accompanying text.

³⁹¹ See *supra* notes 357-58 and accompanying text.

³⁹² See *supra* notes 328-29 and 334-39 and accompanying texts.

³⁹³ See *supra* notes 347-50 and accompanying text.

³⁹⁴ See *supra* notes 354-56 and accompanying text.

basis for the discrimination is pertinent to a material issue in the case.

Once the fact finder determines the type of discrimination at issue (for example, race discrimination or sex discrimination), the determination as to whether the discrimination was pertinent to a material issue in the case should be made on the basis of objective evidence, such as the pleadings or testimony in the case. The determination does not call for a subjective inquiry into the motivation for the discrimination (beyond identifying the category of discrimination). Specifically, the determination does not call for a separation of discrimination based on animus from discrimination based on a desire to gain greater cultural sensitivity ("bad" discrimination versus "good" discrimination). Such a subjective inquiry would unreasonably undermine the efficiency of arbitration.

Along this last line, we have tried throughout to craft a statute that will minimize the potential for additional disruptions, delays, and costs resulting from the ban on discriminatory selection of an arbitrator. Foremost, our proposed statute respects the disputants' bargain in favor of arbitration. Under our proposed statute, the statutory remedy for a disputant who proves by clear and convincing evidence that its adversary impermissibly discriminated in the selection of an arbitrator is vacatur of an arbitration award and *remand for further arbitration proceedings* consistent with the statute.³⁹⁵ A party to an arbitration contract, therefore, may not ever use our proposed statute to evade the arbitration contract and obtain a judicial resolution of the primary dispute.

³⁹⁵ See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001).

[E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.

Id.; *United Paperworkers Int'l v. Misco, Inc.*, 484 U.S. 29, 40-41 n.10 (1987).

Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgement of the appropriate result [as this] would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for. . . .

Id.

Our proposed statute requires that a disputant who comes to have reason to believe that its adversary has selected or struck an arbitrator on an impermissible basis notify its adversary within seven days and seek a hearing before the arbitrator on the matter within fourteen days of its first having reason for such belief. We believe that in most cases this will require a party to act at or very near the time of arbitrator selection or else forfeit its claim. Thus, the requirement of early notice to the adversary will allow the adversary who has violated this Section to admit its violation of the statute and allow for consensual replacement of the arbitrator at an early stage of the proceedings. In the alternative, the requirement of an early appeal to the arbitrator with respect to the alleged discriminatory selection will allow for replacement of the arbitrator at an early stage of the proceedings where the arbitrator finds that his selection was in violation of this Section.³⁹⁶

Conversely, our proposed statute would not allow a disputant to challenge in court the selection or striking of an arbitrator until after the arbitrator has entered a final arbitration award. Any earlier court challenge would unreasonably disrupt and delay the arbitration proceedings. The claim that the arbitrator is tainted by an impermissible selection should be treated like a claim that an arbitrator labors under an impermissible bias. Such a claim may only be brought after entry of a final arbitration award.³⁹⁷ We find the reasoning of the United States Court of Appeals for the Seventh Circuit in relation to this precise issue to be persuasive:

The time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered. To allow a party to bring an independent suit to enjoin the arbitration is inconsistent with fundamental procedural principles

³⁹⁶ See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (“[F]airness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.”).

³⁹⁷ See *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (noting that “it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award” and citing cases so holding).

that apply with even greater force to arbitration than to conventional litigation. If during jury voir dire a *Batson* objection to the exercise of a peremptory challenge is rejected by the trial judge, the disappointed litigant cannot bring a suit to enjoin the litigation. . . . The choice of arbitration is a choice to trade off certain procedural safeguards, such as appellate review, against hoped-for savings in time and expense (other than the expense of the tribunal), a measure of procedural simplicity and informality, and a differently constituted tribunal. That choice would be disrupted by allowing a party to arbitration to obtain an interlocutory appeal to a federal district court. . . .³⁹⁸

Our proposed statute imposes on the movant a high burden of proof so that an arbitration award may not be lightly overturned: The movant must show by clear and convincing evidence that the opposing party selected or struck an arbitrator based on a protected characteristic. The nature of arbitrator selection, particularly the process relating to peremptory strikes in arbitration, will make this a more difficult task in many cases as contrasted with a *Batson* challenge in the context of juror selection. For example, arbitration procedure often allows for only one peremptory strike per side.³⁹⁹ In

³⁹⁸ *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 506 (7th Cir. 2000) (citations omitted).

³⁹⁹ See NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE R. 21(B) (2003) ("Each Party making an appearance may notify the Director in writing . . . striking one of the [Arbitrator] candidates."); NEW YORK STOCK EXCHANGE, DEPARTMENT OF ARBITRATION: ARTICLE XI NYSE CONSTITUTION AND ARBITRATION RULES, R. 609(a) ("In any arbitration proceeding, each party shall have the right to one peremptory challenge."); NATIONAL ASSOCIATION OF SECURITIES DEALERS, CODE OF ARBITRATION PROCEDURE (2003), R. 10311(a) ("In an arbitration proceeding . . . each party shall have the right to one peremptory challenge."). But see AMERICAN ARBITRATION ASSOCIATION PATENT ARBITRATION RULES R. 12 (2003) ("In a single-arbitrator case, each party may strike three names on a peremptory basis. In a multi-arbitrator case, each party may strike five names on a peremptory basis."); AMERICAN ARBITRATION RULES MEDIATION AND ARBITRATION RULES art. 7(2) ("In a single arbitrator case, each party will receive an identical list of ten names from which each party may strike three names on a peremptory basis. In a multi-arbitrator case, each party will receive an identical list of fifteen names from which each party may strike five names on a peremptory basis."). Court-ordered arbitration procedures also commonly allow only one peremptory strike per side. See D. ARIZ. CT. R. PRAC. 2.11(d)(2) ("Each side is limited to one peremptory strike during the pendency of the case."); ARIZ. R. CIV. P. 73(c)(2) ("Each side shall have the right to only one peremptory strike in any one case."); KY. REV. STAT. ANN. SCR 3.815(5)(B)(ii) (Banks-Baldwin 1999) ("Each side may have one peremptory strike.").

contrast, juror selection procedures in the public courts generally grant to the parties multiple peremptory strikes.⁴⁰⁰ Allowing only one strike will make it more difficult in an arbitration proceeding for the movant to demonstrate a pattern of strikes against potential arbitrators sharing a similar protected characteristic.⁴⁰¹

Our hope is that voluntary compliance with the statutory prohibition itself will prevent many instances of discriminatory selection. Moreover, we trust that attorneys in most cases will not lie under oath about the reasons for their strike of a potential arbitrator.⁴⁰² In addition, the nature of arbitrator selection will make it more difficult in many instances, as contrasted with a *Batson* challenge in the context of juror selection, for the striking party to mask a discriminatory strike with pretext. The lack of voir dire (or any in-person contact with the potential arbitrator) prior to the peremptory strike should prevent a party from striking an arbitrator under such favorite pretexts as that the person's demeanor, body language or tone suggested hostility, lack of interest

⁴⁰⁰ See, e.g., CAL. CIV. PROC. CODE § 231 (West 2003) (providing for six peremptory challenges for each party in civil case and up to twenty peremptory challenges each for defendant and prosecution in criminal case); D.C. CODE ANN. § 23-105 (2003) (allowing each side twenty peremptory challenges in trial for offense punishable by death); LA. CODE CIV. PROC. ANN. art. 1764 (West 2003) (providing for three peremptory challenges per side where trial is by jury of six and six peremptory challenges per side if trial is by jury of twelve); MINN. STAT. ANN. § 546.10 (West 2000) ("Each party shall be entitled to two peremptory challenges, which shall be made alternately beginning with the defendant."); N.J. STAT. ANN. § 2B:23-13 (West 2003) (providing each party in civil trial with six peremptory challenges and providing parties in criminal trial between ten and twenty peremptory challenges).

⁴⁰¹ The movant might try to demonstrate such a pattern over a series of cases by examining the striking attorney. See *Swain v. Alabama*, 380 U.S. 202, 223 (1965) (inference of impermissible discrimination in juror selection would be raised by evidence that the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve in petit juries), *overruled by Batson v. Kentucky* 476 U.S. 79 (1986). But see *Batson*, 476 U.S. at 92 (noting that "proof of repeated striking of blacks over a number of cases . . . has placed on defendants a crippling burden of proof [with the result that] prosecutors' peremptory challenges are now largely immune from constitutional scrutiny").

⁴⁰² See *Powers v. Palacios*, 813 S.W.2d 489, 490 (Tex. 1991) (noting that attorney admitted that race was factor in his exercise of peremptory strike against black juror).

or forthrightness.⁴⁰³ Moreover, the arbitral organization's prequalification of the potential arbitrator will make it more difficult for the striking party to assert convincingly a perceived lack of competence as the justification for its strike.

Finally, the proposed statute grants to a court the power to award costs to the moving party where the court finds that the moving party has incurred costs because of the responding party's discriminatory selection of an arbitrator.⁴⁰⁴ The proposed statute also grants to a court the power to award costs to the responding party where the court finds that the moving party filed its motion with respect to arbitrator selection without probable cause. It is our hope that the ability of a court to award these costs will discourage, respectively, discriminatory selection of an arbitrator and frivolous motions filed pursuant to this Section.

VI. CONCLUSION

Over the past decade, the use of arbitration as a means to resolve disputes has sharply increased. As arbitration is more frequently utilized, the likelihood of invidious discrimination occurring in arbitrator selection also increases. While some parties may consent to selecting an arbitrator for particular reasons relating to cultural issues pertinent to their dispute, more troublesome is the thought that employers and businesses, who have greater knowledge about and experience with the arbitral process, might gain control over the arbitrator selection process through the use of invidious peremptory strikes. Opponents of arbitration attempt to adapt existing legal arguments to address this problem. Unfortunately, however,

⁴⁰³ See *Ex parte Bankhead*, 625 So. 2d 1146, 1147-48 (Ala. 1993) (deeming that exclusion of black veniremember because "he 'rubbed his face' in apparent disgust when the trial court mentioned the possibility of sequestration" was suspect); *Epps v. United States*, 683 A.2d 749, 753 (D.C. 1996) (sustaining trial judge's determination that counsel was not credible when he explained his peremptory strikes of white veniremembers by referring to their "body language"); *Washington v. Kentucky*, 34 S.W.3d 376, 379 (Ky. 2000) (holding that exclusion of veniremember for "appear[ing] inattentive or bored," among other reasons for exclusion, could not withstand *Batson* challenge).

⁴⁰⁴ An instance where ordinarily it would not be appropriate for the court to award costs to the moving party would be where the moving party expressly consented to the discrimination, but the arbitration award is nevertheless subject to vacatur because the basis for the discrimination was not pertinent to a material issue in the case.

neither the state action doctrine nor the use of the existing public policy exception to the enforcement of an arbitration agreement or arbitral award will be successful as a means to challenge the use of discriminatory peremptory strikes.

A review of existing case law demonstrates that state action is not present when a private litigant exercises a peremptory challenge in either a court-ordered or contractual arbitral proceeding. A court considering whether a litigant is a state actor when he strikes an arbitrator for discriminatory reasons would quickly conclude that the factors present in cases where state action is found—overt racial discrimination, compulsion of jurors in a public setting or institutional integrity of the courts—are simply not present when a litigant exercises a peremptory challenge in the arbitral setting.

Moreover, existing case law does not support a court's refusal to enforce an arbitration contract or award affected by discriminatory arbitrator selection. The existing public policy exception for enforcement of an arbitration contract or award is exceedingly narrow and would extend to arbitrator selection only if the selection process violated an explicit and well-defined public policy ascertained through the law and legal precedents. While a well-defined public policy does forbid the use of race and sex in jury selection, no similar public policy prohibits enforcement of an arbitration contract or award involving the discriminatory selection of an arbitrator because there is no established law or legislation related to discriminatory arbitrator selection. In addition, the policies that militate against discriminatory juror selection simply do not apply as strongly in the context of arbitrator selection.

Thus, an amendment to the Federal Arbitration Act and the Uniform Arbitration Act is the only means by which the problem of discriminatory arbitrator selection may be addressed. We recommend the adoption of the statute proposed in this Article to address a problem that, if left unchecked, will continue to undermine the arbitral process as well as the dispute resolution movement as a whole.